Office - Supreme Court, U.S.
FILED
OCT 17 1957
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 558

SOUTHERN RAILWAY COMPANY, CAROLINA AND NORTHWESTERN RAILWAY COMPANY, AND STATE UNIVERSITY RAILROAD COMPANY, *Appellants.*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees.*

JURISDICTIONAL STATEMENT

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October 17, 1957.

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v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees.*

JURISDICTIONAL STATEMENT

In compliance with Rules 13 and 15 of the Supreme Court of the United States, as revised, Southern Railway Company, Carolina and Northwestern Railway Company and State University Railroad Company, appellants, together sometimes referred to herein as Southern, submit their statement to show that the Supreme Court has jurisdiction of this appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the United States District Court for the Western District of North Carolina is reported in 153 F. Supp. 57, and is attached as Appendix A. The decision of the Interstate Commerce Commission is reported in 299 I.C.C. 335, and is attached hereto as Appendix B.

The District Court entered no findings of fact or conclusions of law apart from its opinion.

JURISDICTION

This suit was brought by appellants under 28 U.S.C. 1336, to set aside an order of the Interstate Commerce Commission and trial was held before a three-judge Court convened under 28 U.S.C. 2284 and 2325.

The judgment of the District Court dismissing the complaint was entered on July 5, 1957, and notice of appeal was filed in that Court by appellants on August 30, 1957.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. 1253 and 2101(b). The following decisions, which are typical of numerous others to the same effect, sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Thompson* v. *United States*, 343 U.S. 549, 554 (1952); *Dixie Carriers* v. *United States*, 351 U.S. 56, 58 (1956); *United States* v. *Baltimore & O. R. Co.*, 333 U.S. 169, 171 (1948).

QUESTIONS PRESENTED

The questions presented arise as a result of the decision of the Interstate Commerce Commission (Division 2) of November 15, 1956 (set forth in Appendix

B), reconsideration of which was denied by an order of the Commission, dated March 18, 1957. That decision was made following the complaint by certain railroads before the Commission in a proceeding in which appellants herein were defendants.

The Commission reached two main conclusions which are here brought into question.

I. Question as to existence of through routes. The Commission concluded that at the time of its decision "through routes" were in existence for the movement of *fine coal* from certain mines on the Louisville & Nashville Railroad Company, the Interstate Railroad Company, and the Norfolk and Western Railway Company, in the area including the southwestern part of Virginia and the eastern part of Kentucky and Tennessee, to various destinations on the lines of appellants in North Carolina and South Carolina. Such routes embraced as an intermediate carrier either the Clinchfield Railroad or the Georgia Railroad* and were found to be "through routes" for the reason that joint rates on *all sizes of coal* were published thereover (p. 337), although actually, as the Commission found, the routes were "closed" to the movement of fine coal on and after April 8, 1954, "as effectively as if schedules had been established with that sole objective" (p. 339).

The fact is that by tariffs effective April 8, 1954, appellants published, with the concurrence of the originating carriers above named, rates on *fine coal*** be-

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* The Georgia Railroad is not involved as to routes from mines on the Interstate Railroad and on the Norfolk and Western.

** As distinguished from "all sizes of coal" on which a higher level of rates applied.

tween the same origin and destination points just mentioned, the rates being restricted to apply over routes formed with such originating carriers but eliminating the Clinchfield and Georgia, thus preserving appellants' long-haul routes. The rates on fine coal thus published by appellants and restricted to apply only via their long-haul routes, were limited to *fine coal* (a specific description) and were 35 cents per ton less than the rates on *all sizes* of coal (a generic description) published over the routes embracing the Clinchfield or Georgia.

In concluding that the through routes were in existence, because of the availability of the generic description of joint rates in spite of its finding that such routes were actually closed, the Commission held that it was not restricted by the short hauling requirements of section 15(4) of the Interstate Commerce Act, and could, as it actually did, prescribe joint through rates over these routes on exactly the same level as the reduced rates over appellants' long-haul routes. The effect was to open the routes.

The Commission, in appellants' views reopened the routes on the theory that its action was beyond the reach of section 15(4). Appellants recognize that the restrictions in section 15(4) are applicable only where a through route is to be *established*, and therefore, if through routes are already in existence, section 15(4) is not applicable. If, however, as appellants believe, there were no already existing through routes via Clinchfield and Georgia, the Commission admittedly has not complied with section 15(4). This alone would render the order invalid.

The *first basic question* is how could the Commission, acting in conformity with law and facts, find that

"through routes" were actually in existence at the time of the decision via the Clinchfield and Georgia, when in reality the allegations and prayer of the complaints the undisputed facts and its own findings show that these routes were not intended to be used, were not in fact used, and were definitely "closed" as to the movement of fine coal thereover.

More particularly questions on this phase of the case are set forth in appellants' notice of appeal and are here relied upon. Condensed, they may be stated as follows:

(1) In concluding that "through routes" were in existence at the time of this decision and that it was thus relieved of complying with the restrictions in the short-hauling provisions of section 15(4) of the Act, did not the Commission misconstrue the law and violate the "holding out" and "course of conduct" tests recognized by this Court in *Thompson* v. *United States*, 343 U.S. 549, and *Denver & Rio Grande West. R. Co.* v. *Union Pac. R. Co.*, 351 U.S. 321 (1956)?

(2) Could the Commission and the Court validly ignore the allegations and evidentiary showing that the Clinchfield and Georgia routes were in reality closed, and found to be "closed" whether or not described as "commercially" closed, and yet assume that through routes were in existence on the bare theory that "establishment of joint rates presupposes" such routes (p. 337); the joint rates actually not being usable or used for the movement of fine coal, not being used in the course of conduct of the carriers' business, not being in reality a holding out to transport this commodity, and not being the basis of solicitation for the movement thereof?

(3) Was it proper for the Court and the Commission to ignore the fact that complainant railroads before the Commission alleged in their complaint that the Clinchfield and Georgia routes were closed as the result of the restricted, reduced rates, concurred in by the originating carriers, and effective on April 8, 1954, and that the prayer of the complaint of those complainants requested the Commission to require under "section 15(3)" of the Act "the reinstatement" of the "routes eliminated by the action of the Southern Railway", thus admitting that the routes were not existing through routes but that establishment would be necessary in accordance with the provisions of section 15(3) and (4)?

(4) Was the lower Court justified in setting up an additional test not mentioned by the Commission and not required by statute, that even if the Clinchfield and Georgia routes were in practical effect closed, and intended to be closed to the movement of fine coal by the rates which became effective on April 8, 1954, after full opportunity for protest (with no protest) and for suspension (with no suspension), it would be necessary for appellants to show further a long-existing acquiescence implying "an abandonment by mutual consent, of these routes as joint routes" to negative their existence as through routes?

(5) Was the Commission's order which was based on the theory of existing through routes unlawful as not properly supported by findings or evidence in the record but instead contrary to established facts and the Commission's own findings, and, therefore, arbitrary and void in derogation of rights under the short-hauling provisions of the Act and in violation of the due process clause of the Fifth Amendment to the Constitution?

II. Question as to prescription of reasonable joint rates.

Serious questions arise as to the Commission's asserted rate-making powers even if, contrary to appellants' view, through routes via Clinchfield and Georgia be assumed. The correct answers to these questions, it is believed, warrant, for an additional reason, setting aside the Commission's order.

(1) Could the Commission in a broad-scale finding and order in respect to all of the alternate routes via the Clinchfield and Georgia from the points of origin to the points of destination here involved prescribe maximum reasonable rates on fine coal equal in every instance to those voluntarily established by appellants and their connections, without finding that the latter rates are reasonable maximum rates and afford a standard of reasonableness to be substituted for the existing higher rates prescribed by the Commission over the Clinchfield and Georgia routes?

(2) Did the Commission ignore the alternate character of the routes here involved and the long-established principle "that the existence of a lower rate between the same points over a route other than the route of movement does not of itself establish the unreasonableness of the higher rate" (*McHenry-Millhouse Mfg. Co., Inc.* v. *N. Y., O. & W. Ry. Co., et al.*, 151 I.C.C. 501, 502)?

(3) Did the Commission misconstrue and erroneously rely upon section 15a(2) of the Act because, as it found, the "rates [prescribed] will produce more revenue if fixed at a lower rather than a higher level", thus disregarding the purpose of section 15a(2) to deal with the movement of all traffic from the same origin to the same destination, irrespective of the num-

ber of routes, and not to be applied where increase traffic over an open route would correspondingly reduc the movement of traffic over the other route?

(4) In determining the issue of unreasonableness did the Commission misconceive and misconstrue it rate-making powers and rely upon an improper basis intended to penalize applicants, on the theory that the "escaped the burden of proving that cancellation of th joint rates" over the Clinchfield or Georgia route "would be consistent with the public interest" unde section 15(3) of the Act, when the procedure followe by appellants and the concurring originating lines wa an entirely lawful one, in which the proposed reduce rates were filed with the Commission with full oppor tunity for opposing parties to protest and for the Com mission to object and suspend prior to their effectiv date on April 8, 1954, but without objection or sus pension?

(5) Did the Commission act without sufficient ev dence and without necessary findings, and, therefor arbitrarily in equalizing rates via the Clinchfield an Georgia routes, (a) without setting forth in its repor a single rate, representative or otherwise, (b) witho showing the extent of competition or why it woul justify lower rates than those previously prescribe over the Clinchfield and Georgia routes, (c) witho any real comparison with the greater number of line involved via the Clinchfield and Georgia routes or th highly-efficient intermediate yards of appellants, (d without reference to, or facts showing cost-of-tran portation, (e) without proper conception of group r lationships, and (f) without consideration of the fa tha there was no shipper support whatever for th rates prescribed from Norfolk and Western mines ar

from Interstate mines and only insignificant support for the rates from the Louisville & Nashville mines?

(6) Having found that the assailed rates (on coal of all kinds) were and are on a level prescribed by it as maximum just and reasonable rates (270 I.C.C. 291), was not the absence of any finding that such prescribed rates were not a proper basis for the rates on fine coal ordered over the closed routes a fatal omission, particularly in the absence of a finding that the rates to which equalization was required were reasonable maximum rates?

STATUTE INVOLVED

The sections of the Interstate Commerce Act pertinent here are section 1(4) (49 U.S.C. 1(4)) with respect to the duty of common carriers by railroad to establish reasonable through routes, section 15(3) vesting the Commission with power to require the establishment of through routes and joint rates, section 15(4) providing for protection against short-hauling, section 15(7) authorizing the Commission to suspend tariffs prior to their effective dates, and section 15a(2) setting forth various factors to be considered by the Commission in prescribing rates. Pertinent portions of these sections are set forth in Appendix C attached hereto.

For convenience the limitations on the Commission's power to prescribe through routes, as set forth in section 15(4), are here quoted:

> "Sec. 15 (4). In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such

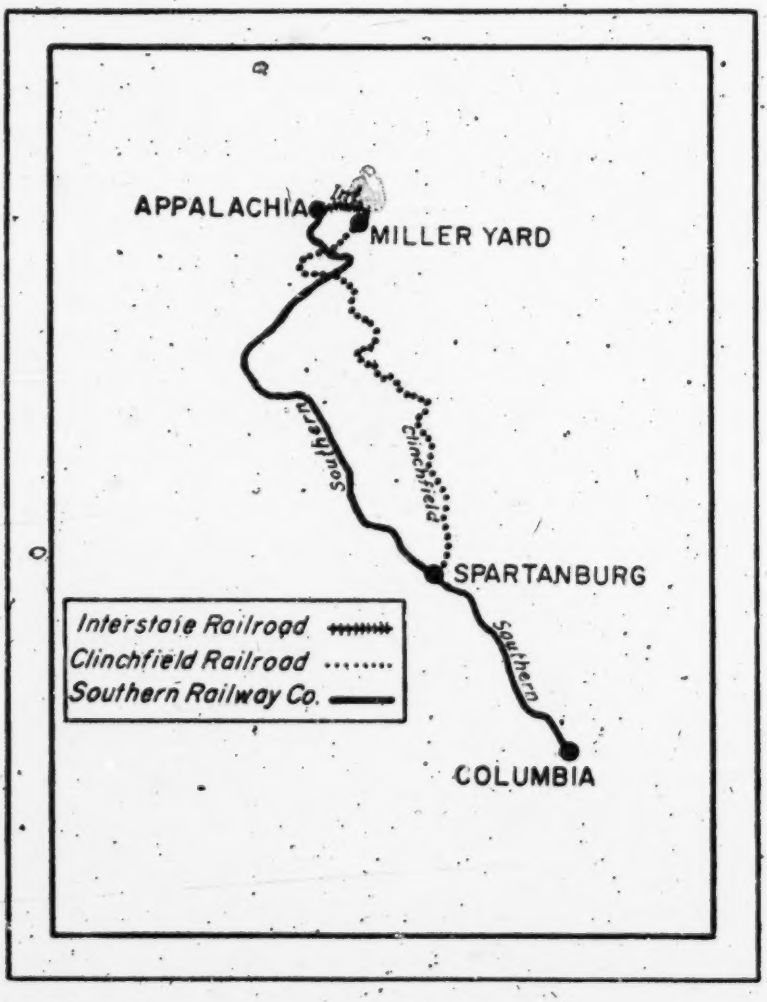
route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through routes unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic."

STATEMENT

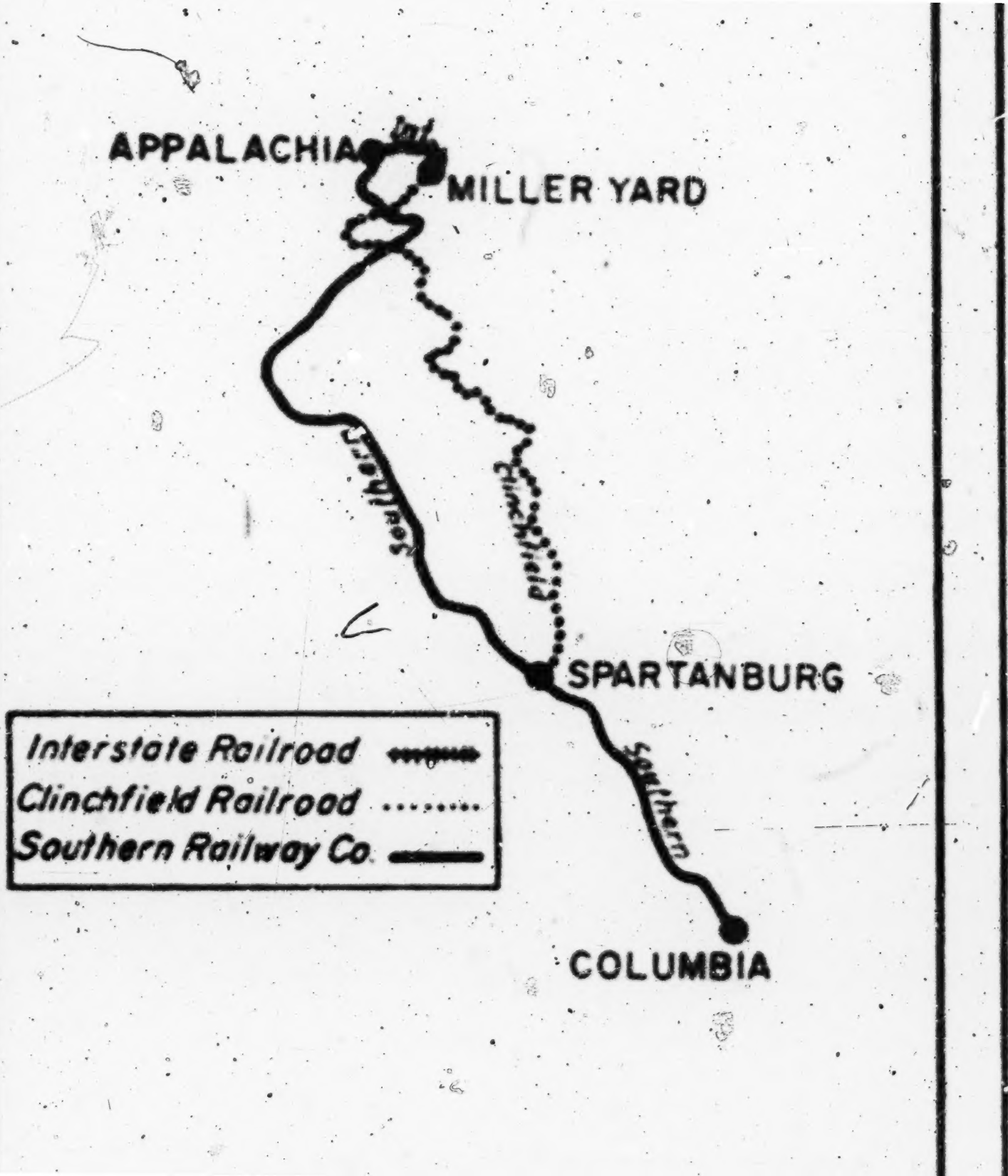
I. SHORT-HAULING PROVISIONS OF THE ACT ARE MISCONSTRUED AND MISAPPLIED.

As previously indicated, the routes here involved are from mines on three railroads, the Louisville & Nashville, the Interstate, and the Norfolk and Western, to various points on appellants' lines in North Carolina and South Carolina. The following diagram indicating the routes from Interstate mines, which are important origin points, to Columbia, S. C., a representative destination, is illustrative of the physical situation presented not only as to origin points on the Interstate

but as to the routes, though different and varying more in distance, from the mines on the other two originating railroads:



It will be noticed from this diagram that the Southern's long-haul route is from its connection with the Interstate at Appalachia, Va., all the way to Columbia, S. C. This is the route over which appellants with the concurrence of Interstate, published on April 8, 1954, a reduced rate on *fine coal*. The reduced rate is specifically restricted in the tariff to apply via this route.


APPALACHIA
MILLER YARD
SPARTANBURG
COLUMBIA
Interstate Railroad
Clinchfield Railroad
Southern Railway Co.

It will further be observed from the diagram that the other route from mines on the Interstate (with the higher rate applicable to *all sizes of coal*) is via Miller Yard where connection is made with the Clinchfield. This route extends southward to Spartanburg where it connects with appellants' line extending to Columbia. It can be seen immediately that via the Clinchfield route the Southern would be drastically short-hauled, since instead of the haul from Appalachia to Columbia (342.9 miles) it would have only 28.5 per cent of that haul, namely, 97.8 miles from Spartanburg to Columbia (R. 246, Ex. 26).

Prior to April 8, 1954, when the reduced rate on fine coal became effective via Southern's long haul route, rates on all sizes of coal, in accordance with maximum rate orders of the Commission in *Carolina Coal Consumers Conference* v. *A. & R. R. Co.*, 270 I.C.C. 291, plus subsequently authorized general increases (report p. 337), applied from the mines over both routes to Columbia. Effective April 8, 1954, the rate on fine coal via appellants' long-haul route became, as noted above, 35 cents less than the rate on all sizes of coal via the Clinchfield route.

April 8, 1954, tariff, not suspended. Appellants' reduced rates on fine coal, concurred in by Interstate,* were filed in appropriate tariffs with the Commission to become effective on April 8, 1954, on statutory notice, namely 30 days, prior to the effective date. Appellants' purpose was to protect their revenues and maintain efficient and economical routes (R. 247). Section 15(7) of the Act vests the Commission with power to suspend, upon protest, or on its own motion,

* Interstate is here used as illustrative but the same situation is true as to the rates from mines on the other railroads.

proposed rates which have not become effective. Thus carriers and shippers had full opportunity under the statute to protest the reduced rate via Southern's long-haul route from the mines on the Interstate to Columbia but did not do so. Nor did the Commission in the exercise of its power to act on its own motion object to the proposed rate or suspend it. Therefore, the reduced rate with the routing restriction became effective on April 8, 1954, as a valid and lawful rate, and as firmly established as if it had been in existence forever.

These facts are cited because the Court and the Commission, it is believed, erroneously misconceived the effect of the reduced rate in the present illustration and the other reduced rates here involved, together with the clear-cut restriction in routing provided as to each such rate. Restricted routes on coal are not uncommon. For example, shippers can use only Louisville & Nashville routes from mines on this line to Cincinnati, O., and Louisville, Ky., and to Atlanta, Ga. (R. 153, 178, 180).

It is to be noted that the complaint was not filed with the Commission until August 29, 1955, more than a year and four months after the reduced rates became effective.

The lower Court's theory. Although stating earlier in its opinion that "Appropriate tariff schedules were filed and the reduced rate on fine coal became effective on April 8, 1954, restricted, however, to those routes on which the Southern had its longest haul", the Court, directly contradicting the evidence of record, and reaching its conclusion adverse to appellants said, among other things (Appendix A, p. 6a):

> "Nothing occurred on April 8, 1954, to change their character as through routes. The tariffs establishing joint rates over them remained in ef-

fect. The publication of lower rates over competing routes diverted traffic from them, but there has been no such acquiescence over an extended period of time as would imply an abandonment, by mutual agreement, of these routes as joint routes.

It would be anomalous, indeed, if a railroad, seeking the closure of a joint route, by establishing a lower rate on a competing route, could relieve itself of the burden of proof imposed upon it and transfer to the other participating carriers in the joint route the heavy burden of meeting the requirements of section 15(4) of the Act."

It was plain from the proposed restricted reduced rates over Southern's long haul-routes that the alternate routes via the Clinchfield or Georgia would be effectually closed to the movement of fine coal. Nevertheless, neither the participating originating carriers in such rates nor any other carriers or shippers protested the rates, as to which burden of proof would be on appellants, and no effort was made to have the rates suspended, and they were not suspended.

The fact is that on April 8, 1954, the routes applicable on fine sizes of coal via Clinchfield or Georgia were intended to be closed as indicated by the lower rates and routing restrictions, and were actually closed to the movement of fine coal. The Commission itself found in its decision of November 15, 1956, more than two years after the reduced rates became effective on April 8, 1954 (p. 337):

"As a consequence of the reduction, fine coal from the origin groups under consideration, except for a few shipments made by mistake, *has not been moving* over routes including the lines of the Clinchfield or the Georgia Railroad". (Emphasis supplied)

The Commission further found that appellants' action" in concurring in the rate reduction—

> "* * * *closed* to traffic the higher rated routes as effectively as if schedules had been established with that sole objective". (p. 339). (Emphasis supplied).

The complainant railroads before the Commission intervening defendants in the lower Court) clearly ecognized in their complaint filed with the Commis- ion that the routes via the Clinchfield or Georgia were losed and that an order under section 15(3), which vould necessarily be subject to the short-hauling limi- ations in section 15(4), would be required to open uch routes. The prayer of their complaint reads:

> "WHEREFORE, complainants further pray that the Interstate Commerce Commission, under the power inferred [sic] upon it in *Section 15(3)* of the Interstate Commerce Act, require defendants [Southern] to answer the charges herein; that after due hearing and investigation an order be made requiring the *reinstatement* of the Clinch- field Railroad, Georgia Railroad, and Seaboard Air Line Railroad* routes *eliminated* by the action of the Southern Railway". (Emphasis sup- plied)

The evidence unmistakably shows, as the Commis- ion found, that the routes via the Clinchfield or eorgia were closed to the movement of fine coal. (See pposing railroad testimony that the Clinchfield and eorgia routes "were closed", were "commercially losed", were "made unavailable" and were "discon- nued" (Witness Roby, R. 99, 104 118, 187, 188, 195, nd Ex. 20, Column 1).

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* By an amendment of the complaint Seaboard was eliminated in e case before the Commission.

Believing that statutory provisions should have a common-sense construction and be interpreted in the light of realities, appellants' view is that the lower Court mistakenly overlooked the fact that the Clinchfield and Georgia routes were actually closed on April 8, 1954, and that it is beside the point to speak of a need, as the lower Court seemed to think, for additional evidence that would "imply an abandonment, by mutual agreement, of these routes as joint routes" to justify finding them closed, particularly since the law places the burden on complainants to establish the unlawfulness of the assailed rates. This is believed to be a basic error of the lower Court in the interpretation of the statute.

Statutory tests recognized in the Thompson case, ignored. A curious circumstance is that the lower Court did not even mention the landmark case of *Thompson* v. *United States*, 343 U.S. 549, supra, which was heavily relied upon by appellants. In that case the question was whether the Commission could treat as existing through routes the line of the Missouri Pacific from various origin points, including Lenora, Kans., to Concordia, Kans., and thence the line of the Burlington to Omaha, Nebr., when the Missouri Pacific had a longer single-line route via Concordia to Omaha, the single-line route from Lenora to Omaha being one-third longer than the two-line route (278 I.C.C. p. 520). The rate on the commodity involved (grain), from Lenora to Omaha was a combination rate totaling 30 cents per 100 pounds via the Missouri Pacific to Concordia and the Burlington beyond. In contrast the single-line route of the Missouri Pacific had a rate of 25.5 cents. This Court held that whether the route via the Missouri Pacific and the Burlington was an *existing*

through route, relieving the Commission of the short-hauling restrictions in section 15(4), depended on certain tests which it held had not been met, and therefore, struck down the Commission's order.

The Court there said (p. 557):

> "In short, the test of the existence of a 'through route' is whether the participating carriers *hold themselves out* as offering through transportation service. *Through carriage* implies the existence of a through route whatever the form of the rates charged for the through service.
>
> "In this case there is no evidence that any through transportation service has ever been offered from Lenora to Omaha via the Burlington. The carriers' *course of business* negatives the existence of any such through route.
>
> * * *
>
> Through service to points short of Omaha cannot be used as evidence of the existence of a through route to Omaha unless we are to hold that compliance with Section 1(4) causes the Missouri Pacific to lose its right to serve Omaha via its own lines, a right guaranteed by Section 15(4) [p. 559]." (Emphasis supplied)

In holding that the Commission had misconstrued the statute and that the evidence did not support the Commission's finding that a through route existed the Court said (pp. 560-561):

> "We hold that the Commission's efforts to support its finding that a through route from Lenora to Omaha via the Burlington line already exists are inconsistent with the meaning of the term 'through route' as used in the Interstate Commerce Act. Since there is admittedly no evidence that the Missouri Pacific ever offered through trans-

portation service over the route in question, the Commission's order is without evidentiary support under the accepted tests for determining the existence of a through route."

The Court thus in construing the statute set forth a realistic and practicable test which should be applied here, namely, whether the carriers in the Clinchfield and Georgia routes "hold themselves out as offering through transportation service" over such routes as indicated by their "course of business" in respect to the traffic involved*.

The record is utterly devoid of any evidence or contention that any fine coal shipments were *solicited* via the Clinchfield or Georgia routes. The publication of the reduced rates, with restricted routing, put the public on notice that as distinguished from rates applying on all sizes of coal as a general description, specific rates on fine coal on a lower level would be available via Southern's long-haul routes and not via the Clinchfield and Georgia routes. As previously pointed out, the "course of business" of the carriers and also of the shippers was that, except for a few shipments by mistake, there was no movement of fine coal via the Clinchfield and Georgia routes, and those routes were "closed" to the actual movement of fine coal.

Appellants believe that the lower Court in ignoring these tests failed properly to construe the statute in question.

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* This is the interpretation by the Commission itself of the test of the Court in the *Thompson case* as set forth in *Denver & R. G. W. R. Co.* v. *Union Pac. R. Co.*, 287 I.C.C. 611, 616. This decision was sustained by the Supreme Court in *Denver & Rio Grande West. R. Co.* v. *Union Pac. R. Co.*, 351 U.S. 321 (1956).

Certainly the fact that lump coal or sizes other than fine coal may continue to move via the Clinchfield and Georgia routes is of no significance, as was the through transportation over the Missouri Pacific-Burlington route to points short of Omaha. Moreover, the fact that fine coal within the generic classification of all sizes of coal, might have moved in quantity over the Clinchfield and Georgia routes prior to April 8, 1954, is, appellants believe, of no legal or factual significance and the lower Court's view to the contrary is error.

D. & R. G. W. case and certain other Supreme Court cases misapplied. In *Denver & Rio Grande West. R. Co.* v. *Union Pac. R. Co.*, 351 U.S. 321, this Court upheld the decision of the Commission in which the D&RGW contended that its lines were included in existing through routes in connection with the Union Pacific and that the Commission was, therefore, not bound by the restrictions in section 15(4). The Commission found against this contention and was sustained by the Supreme Court. The Commission in its decision (287 I.C.C. 611), as previously indicated, quoted from the *Thompson case, supra*, as to the tests to apply and said (p. 616):

> "It thus becomes necessary to determine whether the carriers in this proceeding 'hold themselves out as offering through transportation service' from and to the points here concerned via the Ogden gateway as indicated by their 'course of business' in respect of traffic over the routes in question."

This Court in reviewing the Commission's order said that in its opinion the finding of the Commission as to absence of solicitation of traffic over the Rio Grande route by which the higher-combination rate applied and its finding as to the "carriers' course of

business" were supported by the record. Part of the quotation from the Commission's decision is as follows (p. 330):

> " 'The whole course of conduct of the Union Pacific, so far as revealed, has been for many years and is now to guard jealously its long haul and not open commercially the Rio Grande routes on this traffic'. 287 I.C.C. at 618."

The Court then said (p. 330):

> "We adhere to the 'holding out' test of the Thompson case. The evidence before the Commission was not such as to compel it to find that the Union Pacific held itself out as offering through service over the Rio Grande lines."

The lower Court in the present case made no mention of the holding-out test as applied by the Commission in that case, but apparently considered as controlling many years of disuse of the D. & R. G. W. routes, saying that the routes were held to be "technically closed as through routes where it appeared that joint rates had been cancelled more than forty years previously and over which in the last forty years shipments could move only at much higher combination rates" (Appendix A, p. 6a).

While the lower Court recognizes that the reference in the Supreme Court decision to the history of the rates was only "one" of the circumstances referred to, it appears that it was an extremely minor one and that the findings of the Commission quoted by the Court were the real basis for sustaining the order.

It is to be remembered that the Court in that case approved the prior statement in the *Thompson case* as to the importance of compliance with section 15(4) saying (p. 327):

> "We there emphasized the purpose of section 15(4) to bar the Commission from compelling railroads to establish through routes resulting in trunk line 'short-hauls' without faithful observance of restrictive conditions imposed by that section."

It is true that in the *Thompson case* and the *Denver & Rio Grande Western case,* the rates over the routes in question were combination rates, while in the present case the rates are joint rates on all sizes of coal. The mere fact that the latter rates are joint rates is not controlling, and the lower Court although saying that "the existence of a joint rate necessarily presupposes the existence of a through route" (citing *United States* v. *Great Northern Railway Co.,* 343 U.S. 562) nevertheless found it necessary to rely upon other reasons to support the Commission's order. The *Thompson case,* itself, by its holding that "whatever the form of the rates charged for through service" through routes are implied by actual carriage (343 U.S. p. 557), clearly indicates that the form of rates is not controlling and that the Commission's theory of presupposition is erroneous.

It would seem strange indeed if the existence of joint rates meant through routes as a matter of law, because, as is well known, joint class rates applying to a generic description of traffic and usually on a high level are published without routing restrictions and therefore apply over nearly every railroad route in the country. It seems utterly unreasonable, for example, that an alternate route having a high joint class rate as compared with the long-haul route of the carrier with a low commodity rate should be considered an existing through route, as a matter of law, where over the

former route the only rate applicable to the commodit in question would be a high joint class rate with n movement of the commodity thereunder.

Class rates are either local or joint, short-mileag rates applying to certain classes of commodities accord ing to their recognized characteristics, as for exampl first-class rates (class 100) applicable to commoditie classified within the first class, other classes being per centages of first class. The rates apply without rout restriction throughout almost the entire United State Hundreds of routes between the same origin and dest nation points under joint rates may be available. I "the vast territory * * * involved", the Commission ha said "there are literally millions of routes" *Class Rate in the United States,* 294 I.C.C. 662, 666.

A commodity, as for example, lithium ore, may b given a low commodity rate by a carrier over a re stricted route between certain points. The same com modity being classified in a certain class would b covered by *joint* class rates over numerous other route which would be unusable or closed because of the highe class rates. To establish such commodity rate, th carrier would have to file a tariff with the Commissio which, on good cause shown, could be suspended by th Commission prior to its effective date. If not sus pended, it would become effective.

To hold under such conditions that the Commissio after the effective date of the commodity rate, coul open all the routes over which joint class rates wer published by assuming to exercise its rate-makin power so as to require the same rates on the specif commodity over those routes as over the restricte routes would run directly counter to the short-haulin provisions of section 15(4) and prevent meritoriou

reductions in the interest of shippers and the public. On the other hand, the joint class rates having general application could not be cancelled by the carrier publishing the commodity rate. This is true in the present case as to the general purpose rates applicable to all sizes of coal, and prescribed by the Commission in the *Carolina Coal Consumers case,* 270 I.C.C 291, *supra.* Compare *Seaboard Air Line Ry.* v. *Carolina & Northwestern R. Co.,* 194 I.C.C. 183. The mere existence of joint class rates over those routes does not mean that the routes could be treated as existing routes within the short-hauling provisions of section 15(4) of the Act.

The Commission by its approach has in substance emasculated the meaning of the short-hauling provisions of section 15(4). Congressional intent and the salutary purposes of the statute protecting a carrier's common-law right to its long haul have been defeated. Indeed, if this unique theory that the joint rates presuppose through routes is sustained, section 15(4) has largely been written off the statute books by the very agency which the law was designed to restrain from arbitrary action. This would be another "unwarranted distortion of the statutory pattern" similar to the abortive effort of the Commission in the *Thompson case,* where this Court said:

> "* * * the logical conclusion of the theory advanced by the Commission is that through routes exist between all points throughout the country wherever physical rail connections are available." (343 U.S. p. 559)

The joint-rate presupposition theory as to through routes coupled with the "joint-rate" nature of class rates would likewise result in the conclusion that "through routes exist between all points throughout the country * * * ".

Here it is to be remembered that the rate over the Clinchfield and Georgia routes is on all sizes of coal, while the rate over appellants' long-haul routes is specifically on fine coal and clearly restricted to these routes. The public is put on notice of the difference.

Cases cited by the Court not in point. As to the *Great Northern Railway Co. case,* 343 U.S. 562, (1952), cited by the lower Court, the question was whether—

> "the Commission has power to establish joint rates for the purpose of assisting a [20-mile, stub-end rail] carrier to meet its financial needs" (p. 564).

The Court said that—:

> "the through routes in question already exist since the carriers concerned have continuously provided through service over the same through routes at a combination of separately established rates".

The Commission's order requiring joint rates over already existing through routes and prescribing divisions thereof was held not to be prohibited by the weak-carrier provisions of section 15(4). The Court made plain that in that case, unlike the situation here, there were no alternate rail lines and no *short-hauling* problem was involved.* There is no holding, appellants believe, that the mere existence of joint rates necessarily means the existence of through routes over which the rates apply. In the present case, regardless

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* The Court said, page 570:

> "Since existence of a short-hauling problem presupposes the existence of alternate rail connections, such a problem cannot arise in this case where the Montana Western [the short line] is the only carrier serving Valier [on the short line]."

of the joint rates on all sizes of coal, those rates in any realistic sense, are not used or usable in actual practice and the routes are actually closed.

The *Virginian Railway Company case,* 272 U.S. 658, cited by the lower Court, did not involve alternate rail lines but did involve unlawful discrimination. It was held not controlling in the *Thompson case,* footnote 18 at p. 560, and is not controlling here. The *Great Northern Ry. case,* 81 F. Supp. 921, affirmed 336 U.S. 933, also cited by the lower Court, related to an order requiring transit and it was held that a through route "is not created by creating a transit" (p. 925). The case is not in point.

For reasons outlined above appellants believe that the decision of the lower Court is erroneous, that it should be reversed, and that the questions presented are important ones for consideration by this Court.

II. CONTRAVENTION OF STATUTORY STANDARDS WITH RESPECT TO PRESCRIPTION OF REDUCED JOINT RATES ON FINE COAL.

Aside from errors believed to exist with respect to the lower Court's holding that through routes are in existence, there is further error, appellants believe, in the departure from statutory standards in finding rates via the Clinchfield and Georgia routes to be unreasonable maximum rates on fine coal and requiring equalization of such rates with those voluntarily established by appellants and their connections over appellants' long-haul routes.

The lower Court cites relative distances, car-mile revenues, different treatment given the Chesapeake & Ohio Railway mines, and the need for reducing the rates to move traffic as sufficient to justify the

Commission's findings on this phase of the case (Appendix A, pp. 7a, 8a).

While recognizing the broad discretion which the Commission has in determining reasonableness of rates, this agency is nevertheless subject to certain requirements under the statute, and it is believed that these have unjustifiably been departed from.

Reasonable standard of comparison not found. In spite of the fact that the rates on all sizes of coal via the Clinchfield and Georgia routes are those prescribed by the Commission in *Carolina Coal Consumers Conference* v. *A. & R. R. Co.*, 270 I.C.C. 291, plus subsequently authorized general increases (report, p. 337), the Commission in the present case finds that rates on fine coal over the closed routes must be 35 cents less than those prescribed rates and must not exceed the rates voluntarily established by appellants and their connections via appellants' long-haul routes. The prescribed rates are related to appellants' reduced rates, just as if this were a discrimination case, when in fact there has been no allegation or finding of unlawful discrimination under the Act.

A well-established principle is that, in the absence of unlawful discrimination which is not here involved, there is a zone of reasonableness within the managerial discretion of the carriers and they may voluntarily establish rates which are lower than reasonable maximum rates but which the Commission itself may not require. For example, in *New York Cent. R. Co.* v. *United States*, 99 F. Supp. 394, affirmed by the Supreme Court per curiam, 342 U.S. 890 (1951), the Court said, in holding an order of the Commission to be void (p. 398):

"The primary position taken by plaintiff railroads is that carriers are free to adjust their rates to meet competition, so long as the adjusted rates are within the 'zone of reasonableness' and result in no undue prejudice or preference or discrimination prohibited by the statute. While the Commission has in its brief made an extended argument attacking this position, we think the plaintiffs' statement of the principle is sound and is adequately supported by authority. United States v. Chicago M., St. P. & Pac. Railroad Co., 1935, 294 U.S. 499, 506, 55 S. Ct. 462, 79 L. Ed. 1023; Texas & Pac. Ry. Co. v. United States, 1933, 289 U.S. 627, 635-37, 53 S. Ct. 768, 77 L. Ed. 1410."

The Court held that basic findings are necessary to sustain an order of the Commission, citing Supreme Court cases, p. 400, 401, 405, and that these had not been made.

These principles, it is believed, have been departed from in the present case, particularly where alternate routes are involved, as here. Because a carrier within the zone of reasonableness elects to reduce its rates via its longer-haul routes, does this means that it will automatically be subject to the penalty of having to reduce rates over alternate routes to the same level?

Here it is believed that the Commission has made such requirement, without finding that the reduced rates over appellants' longer-haul routes constitute reasonable maximum rates and afford a standard of reasonableness to be substituted for the existing higher rates prescribed by the Commission over the Clinchfield and Georgia routes which higher rates were and still are unchanged as maximum reasonable rates. (See finding as to rates prescribed in Carolina Coal Consumers case, at p. 337 of the Commission's report.)

Although the lower Court in the present case relies upon *Virginian Ry. Co.* v. *United States,* 272 U.S. 658, supra, the fact is that in that case the Commission had expressly found (98 I.C.C. 488, 496) that the compared rates "afford a standard of reasonableness".

No finding that departure from the rates prescribed in 270 I.C.C. 291 is justified. The Commission in 299 I.C.C. p. 337, made this factual finding:

> "Except for the reduced rates on fine coal, the rates referred to are on the level prescribed in *Carolina Coal Consumers Conference* v. *A. & R. R. Co.,* 270 I.C.C. 291, plus subsequently authorized general increases."

This means that the assailed rates over the closed routes were not and are not found in excess of a level prescribed as lawful rates by the Commission. Notwithstanding this factual finding, there is complete absence of any finding that the rates thus prescribed as maximum just and reasonable rates could be departed from in ordering the reduced rates on fine coal over those routes. This was a fatal omission, particularly in the absence of a finding that the rates to which equalization was required could be considered as reasonable maximum rates.

This Court in a number of cases has pointed out the necessity of adequate findings by the Commission to support its ultimate conclusions, if its orders are to be sustained as valid. See, for example, *Interstate Commerce Commission* v. *Mechling,* 330 U.S. 567, 583 (1947); *State of Florida* v. *United States,* 282 U.S. 194; *United States* v. *Baltimore & Ohio R. Co.,* 293 U.S. 454; *Atchison, Topeka & Santa Fe R. Co.* v. *United States,* 295 U.S. 193; *United States* v. *Carolina*

Freight Carriers Corporation, 315 U.S. 475; *City of Yonkers* v. *United States*, 320 U.S. 685; *Eastern-Central Motor Carriers Association* v. *United States*, 321 U.S. 194; *State of North Carolina* v. *United States*, 325 U.S. 507; and *State of Alabama* v. *United States*, 325 U.S. 535.

Rule as to alternate routes. The Commission is believed further to have departed from the well-established principle with respect to prescribing rates over alternate routes. The Commission said, for example, in *McHenry-Millhouse Mfg. Co.* v. *N. Y. O. & W. Ry. Co., et al.*, 151 I.C.C. 501, 502, supra,

> "We have repeatedly said that the existence of a lower rate between the same points over a route other than the route of movement does not of itself establish the unreasonableness of the higher rate."

This would mean, of course, that a mere comparison of distances, or earnings per mile, as resorted to by the Commission in the present case, would not be significant, because, in substance, it would be merely a comparison of rates over the two routes.

Section 15a(2). The Commission in support of its decision of unreasonableness states (p. 339):

> "Where there is before us clear and convincing evidence that rates will produce more revenue if fixed at a lower rather than a higher level, we may take that fact into consideration in prescribing a maximum reasonable basis, for we are enjoined by the so-called ratemaking rule of section 15a(2) of the act to give consideration to the 'effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed.'"

Such reasoning is based on a misconstruction of the statute, which is believed to be a fatal error. Section 15a has reference to all traffic from a point of origin to a destination, irrespective of the routes taken. It is concerned with whether the shippers, taking into account cost at origin plus the transportation charge, can compete in the market at destination and thus have their traffic moved. Here traffic can move freely over open routes, and the total volume from origin to destination would not be increased by opening the Clinchfield and Georgia routes, but the effect would be to take traffic away from appellants' long-haul routes to the extent of the increase in volume of the open routes. There would be merely a "resulting rearrangement in the movement of rail traffic". Compare *United States* v. *Great Northern Ry. Co.*, 343 U.S. 562, 751.

Reduced rates effective April 8, 1954, without suspension. The Commission has relied upon an improper factor, it is believed, in apparently assuming that appellants should be penalized by an unreasonableness finding, because, as the Commission said, they "escape the burden of proving that cancellation of the joint rates" over the Clinchfield or Georgia routes "would be consistent with the public interest" under section 15(3) of the Act. The fatal flaw in this reasoning is that the procedure which appellants and the concurring originating lines followed was an entirely lawful and proper one. The proposed reduced rates were filed with the Commission with full opportunity for protest and suspension and became effective on April 8, 1954, without objection or suspension. Such procedure is in accord with procedure recognized by the Commission as proper in other cases. See, for example, *Cement from the South to Jacksonville*, 292

I.C.C. 397, involving restricted routing in connection with reduced rates on cement. In case of suspension, the burden would have been on applicants. When there was no suspension and when the rates became effective on April 8, 1954, the burden then rested on those objecting to the rates. Those who objected to the closing of the Clinchfield and Georgia routes considered it inexpedient to protest or object before the reduced rates with restrictions became effective, but this is no valid reason for ignoring the legal effect of the rates and restrictions thus established or for making the unreasonableness finding here involved. As previously noted, the complaint before the Commission was not filed until over a year and four months after the rates became effective and the restrictions became operative.

Absence of shipper support. The Commission makes no mention of the fact that there was no testimony whatever by any shippers or receivers of coal from mines on the Interstate Railroad and Norfolk and Western in support of opening through routes via the Clinchfield or Georgia or of reducing the rates thereover. The shipper testimony as to shipments from mines on the third originating carrier, the Louisville & Nashville, was extremely general, indefinite, and lacking in significance. For example, the principal witness, appearing for the Harlan County Operators, said as to the proposed Clinchfield route that he relied upon emergency conditions such as strikes, washouts, and landslides (R. 145, 146) and said "To me it is strictly a safety valve proposition". He further said as to the existing Southern Railway route "In fact, I like it. I have no intention, even if the route is restored, of trying to get any coal routed over the other way" (R. 156).

Other short cuts undermining ultimate conclusions. There was not even a semblance of cost showing in support of the Commission's unreasonableness finding. There is no comparison in the report of the multiple routes involved via the Clinchfield and Georgia with appellants' reduced-rate routes and no mention of appellants' highly efficient intermediate yards. There was apparently no consideration given to the principle that rates reduced to meet water, truck, or oil competition must be clearly justified. For example, in *Whatcom County Traf. & Rates Bur.* v. *C., M., St. P. & P. R. Co.*, 287 I.C.C. 442, 443, the Commission said that the compared "rates, having been reduced in order to meet the competition of substitute fuels to a level lower than that established on October 16, 1923, in accordance with our findings in *Western Coal Rates*, 80 I.C.C. 383, are depressed and do not represent a valid test of reasonableness". See also *International Minerals & Metals Corp.* v. *Southern Pac. Co.*, 279 I.C.C. 617, 620. Disturbance in the grouping of mines was erroneously assumed when, in fact, the mines continued to be related exactly as they were before appellants' reduced rates and restricted routes became effective, and the shippers could continue to ship in accord with such relationships over those routes. There was nothing to show that the routes from the Chesapeake & Ohio Railway mines, with the Clinchfield a necessary link, were properly comparable or in any way controlling. The complaint did not involve such mines.

The above, among other reasons, it is believed, show that the ultimate unreasonableness findings by the Commission, in addition to those as to through routes, are not justified by necessary supporting findings or evidence and that the Commission's order is invalid.

QUESTIONS ARE SUBSTANTIAL AND IMPORTANT

Appellants believe that the Commission and the Court have erroneously construed the Interstate Commerce Act, have disregarded and misapplied statutory standards for determining existing through routes, have run counter to principles established by decisions of this Court, and have without authority of law and without necessary findings and supporting evidence stripped appellants of their right to benefit from their long hauls in through routes as provided for in section 15(4) of the Act. The case relates to a large movement of traffic, and the adverse decision here appealed from, if sustained, would mean serious injury to appellants.

If the Commission's theory as to the necessary effect of joint rates as establishing the existence of through routes, regardless of evidence as to the non-usability of such routes, should be accepted as a general principle, it would virtually make a shambles of the short-hauling provisions of section 15(4) of the Act, and discourage, if not bar, numerous meritorious reductions in rates of benefit to shippers and the public.

Even if contrary to what appellants believe to be the law, the order should not be declared to be invalid because of the erroneous theory of the Commission and the lower Court as to existing "through routes", it is, nevertheless, believed to be invalid because of the misapplication of the Commission's powers under the Act in prescribing an equality of rates without lawful authority, without complying with statutory standards, and without the necessary findings and evidence to support the order.

The serious spectacle is presented of another attempt improperly to whittle away the important rights of carriers to benefit from routes in which they have the long haul. The right to such long haul is emphasized in the *Thompson case,* supra. In the light of the legislative history set forth therein, the following somewhat sharp statement appears appropriate here:

> " * * * the latter's [Commission's] persistence in recommending repeal of section 15(4) has been matched and overborne by the persistence of Congress in retaining it. Congress has emphatically made clear that in its view the national interest requires the protection of railroads against being short-hauled. Encouragement should not be given to disregard of that policy * * *. If the requisite findings or conclusions are ambiguous or unclear, or the policy of the section is slighted, our duty demands remand to the Commission to dispel ambiguity or to secure clarity and obedience to the policy.*

Aside from the questions under section 15(4), it appears that blanket treatment has been given and short cuts taken in respect to the finding of unreasonableness of the rates here involved in such manner as to constitute action beyond the Commission's authority.

In view of the contentions made by the Commission and by the United States as to the meaning of section 15(4) of the Act and the interpretation to be made of the *Thompson case* and *Denver & Rio Grande West. case,* it is believed important to have the questions finally decided. Such clarification is desirable in the interest of carriers, shippers, and the public at large.

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* Dissenting opinion of Mr. Justice Frankfurter in *Denver & Rio Grande West. R. Co. case,* 351 U.S. 321, 336-337, supra.

It is not to be overlooked that the Commission has not purported to be governed at all by the short-hauling provisions of section 15(4) and that in equity if it should act in accordance therewith there is full power to protect the public interest. The Commission can require carriers to short-haul themselves upon findings, not attempted here, that their routes "are unreasonably long" or that the proposed through routes are "needed in order to provide adequate, or more efficient or more economic transportation". Also, the Commission could proceed by proper findings not present here, to exercise its rate-making authority under the Act if contrary to appellants' view, through routes should be held to be in existence.

Appellants respectfully submit, therefore, that jurisdiction of this case on appeal is fully shown by the above, that the questions presented by this appeal are substantial and of vital public importance, that the case should be heard by the Court in briefs and oral argument, that the judgment of the lower Court should be reversed, and that the Commission's order should be set aside.

Respectfully submitted,

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For Appellants.

October 17, 1957.

PROOF OF SERVICE

I, R. Granville Curry, one of the attorneys for appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of October, 1957, I served copies of the foregoing statement on the several parties hereto, as follows:

(1) On the United States, by mailing a copy in a duly addressed envelope, with first-class mail postage prepaid, to—

The Solicitor General,
Department of Justice,
Washington 25, D. C.

Victor R. Hansen, Esq.,
Assistant Attorney General,
Department of Justice,
Washington 25, D. C.

James E. Kilday, Esq.,
Attorney, Department of Justice,
Washington 25, D. C.

Charles R. Esherick, Esq.,
Attorney, Department of Justice,
Washington 25, D. C.

and by mailing a copy in a duly addressed envelope, with airmail postage prepaid to—

James M. Baley, Jr., Esq.,
United States Attorney,
United States Court House,
Asheville, N. C.

(2) On the Interstate Commerce Commission by mailing copies duly addressed with first-class postage prepaid to—

Robert W. Ginnane, Esq.,
General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

B. Franklin Taylor, Jr., Esq.,
Assistant General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

(3) On intervening defendants by mailing copies duly addressed with air-mail postage prepaid to their respective attorneys of record as follows—

A. K. McIntyre, Esq.,
Clinchfield Railroad,
Erwin, Tenn.

R. B. Gwathmey, Esq.,
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James W. Hoeland, Esq.,
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Louisville, Ky.

.....

R. GRANVILLE CURRY

APPENDIX A

SOUTHERN RAILWAY COMPANY, ET AL., *Plaintiffs*,

v.

THE UNITED STATES OF AMERICA, ET AL., *Defendants*.

Civ. A. No. 1253.

United States District Court
W. D. North Carolina,
at Charlotte.

July 8, 1957.

John M. Robinson, Charlotte, N. C., W. T. Joyner, Raleigh, N. C., Arthur J. Dixon, Henry J. Karison and R. Granville Curry, Washington, D. C., for plaintiffs.

Victor R. Hansen, Asst. Atty. Gen., James M. Baley, Jr., U. S. Atty., Asheville, N. C., James E. Kilday and Charles R. Esherick, Attys., Dept. of Justice, Washington, D. C., for defendant United States.

Robert W. Ginnane, Gen. Counsel, B. Franklin Taylor Jr., Asst. Gen. Counsel, Washington, D. C., for defendant Interstate Commerce Commission.

A. K. McIntyre, Erwin, Tenn., J. P. Fishwick, Roanoke, Va., R. B. Gwathmey, Wilmington, N. C., James W. Hoeland, Louisville, Ky., for railroad intervenors, defendants.

Before PARKER, Chief Judge, HAYNSWORTH, Circuit Judge, and WARLICK, District Judge.

HAYNSWORTH, *Circuit Judge*.

This action was commenced in the United States District Court for the Western District of North Carolina by the plaintiffs, components of the Southern Railway System, against the United States and the Interstate Commerce Commission to enjoin the enforcement of a decision and order of the Interstate Commerce Commission en-

tered on November 15, 1956, in a proceeding entitled "Carolina, Clinchfield and Ohio Railway v. Southern Railway Co., et al."

Pursuant to the requirements of § 2325 of Title 28 of the United States Code, a three-judge Court was convened in accordance with the provisions of § 2284 of Title 28 of the United States Code, and the case was heard in accordance with the requisite procedures therein set forth.

Upon motion Atlantic Coast Line Railroad Company, Carolina, Clinchfield and Ohio Railway, Carolina, Clinchfield and Ohio Railway of South Carolina, Georgia Railroad & Banking Company, Interstate Railroad Company, Louisville and Nashville Railroad Company, Norfolk and Western Railway Company, and Harlan County Coal Operators Association were permitted to intervene as parties defendant.

The controversy revolves around rates applicable to certain routes for fine coal moving from mines on the lines of the Interstate Railroad Company, the Louisville and Nashville and the Norfolk and Western in eastern Kentucky, eastern Tennessee and Southwestern Virginia to destinations on the lines of the Southern and its short line connections in North Carolina and South Carolina.

Prior to April 8, 1954, there were in effect joint rates on through routes to destinations on the lines of the Southern in the Carolinas which were applicable to all grades of coal. From mines in the Clinch Valley area on the lines of the Norfolk and Western coal could move over the lines of that railroad to St. Paul, Va.; thence by the Clinchfield to Marion, N. C., or Spartanburg, S. C., and the Southern beyond. Alternately it could move over the lines of the Norfolk and Western to Norton, Va.; thence via Interstate to Appalachia and the Southern, through Asheville, beyond.

From mines on the Interstate the coal could move to Miller Yard; thence via the Clinchfield to Marion, N. C., or

Spartanburg, S. C., and the Southern beyond, or, alternately, to Appalachia and the Southern, through Asheville, beyond.

From mines in the Harlan District on the Louisville and Nashville the coal could move to Dorchester Junction, Va.; thence by Interstate to Miller Yard; thence by Clinchfield to Marion, N. C., or Spartanburg, S. C., and the Southern beyond, or it could move westwardly by the Louisville & Nashville through Corbin, Ky. to Knoxville, Tenn., thence by Southern, through Asheville, beyond.

For destinations in the southern portions of South Carolina, coal originating on the L and N could move by a third alternate, over the lines of that railroad to Atlanta, thence the Georgia Railroad to Augusta, Ga., and the Southern beyond.

All of these were open, active routes, and fine coal, as well as other grades of coal, moved over the routes in which the Clinchfield and the Georgia Railroad were participants.

Because of increasing competition from natural gas, oil and other fuels the carriers involved proposed a voluntary reduction in the rate on fine coal amounting to 35¢ a ton. A like reduction was proposed upon coal originating in mines on the lines of the Chesapeake & Ohio moving by that railroad to Elkhorn City, Ky., and thence by the Clinchfield to Marion, N. C., or Spartanburg, S. C., and the Southern beyond.

The Southern agreed to the proposed reduction but restricted its agreement to those routes over which it got its longest haul. It thus participated in the reduction on the Clinchfield route for coal originating on the lines of the Chesapeake & Ohio, but declined to participate in the reduced rate on fine coal moving from mines on the Louisville and Nashville, the Interstate and the Norfolk and Western over routes in which the Clinchfield or the Georgia Railroad were participating carriers. Appropriate tariff

schedules were filed and the reduced rate on fine coal became effective on April 8, 1954, restricted, however, to those routes on which the Southern had its longest haul.

Because of the resulting rate differential of 35¢ a ton, shipments of fine coal were diverted from the Clinchfield and Georgia Railroad routes and thereafter the only shipments of fine coal moving over the higher rated routes appeared to have been the result of mistake or inadvertence of the shipper.

Coal in larger sizes, unaffected by the rate reduction on fine coal, continued to move over routes of the Clinchfield and the Georgia Railroad as theretofore.

On August 29, 1955, approximately seventeen months after the reduced rates on fine coal on the restricted routes became effective, the Louisville and Nashville, Norfolk and Western, Interstate, Clinchfield, Georgia Railroad and the Seaboard Air Line Railroad filed a complaint with the Interstate Commerce Commission, in which the Southern was made the defendant, for the establishment of reasonable joint rates upon the routes in which the Clinchfield and the Georgia Railroad were participating carriers. That proceeding resulted in the decision and order, enforcement of which the Southern now seeks to enjoin. In its order the Commission required the carriers involved to place into effect and maintain joint rates on fine coal from the mines of origin to destinations on the Southern, and its short line connecting carriers, in the Carolinas over routes in which the Clinchfield and the Georgia Railroad were participants at the same level as the previously published rates restricted to the routes in which the Southern had its longest haul.

The position of the Southern is that the voluntary reduction in the joint rate on fine coal restricted to those routes on which it had its longest haul, effectively closed the alternate routes to fine coal traffic and that those routes cannot be "reopened" for such traffic except pur-

suant to the provisions of § 15(4) of the Transportation Act of 1940 and upon the basis of full and complete findings in accordance with the standards of that Section. In effect, the position of the Southern is that the order of the Commission, would compel the creation or establishment of through routes which were nonexistent in August 1955.

With this position, we cannot agree.

The Southern with the other carriers concerned, many years ago, had established through routes and joint rates over the lines of the Clinchfield and the Georgia Railroad for all sizes of coal moving from mines on the L. & N. the Interstate and the Norfolk & Western, in the areas with which we are concerned, to destinations in the Carolinas on the lines of the Southern and its short line connections. The rates for such coal of all sizes had been fixed by the Commission in Carolina Coal Consumers Conference v. A. & RR Co., 270 I.C.C. 291, to which there had been added subsequently authorized general increases. There is no doubt that prior to April 8, 1954, the routes of the Clinchfield and the Georgia Railroad were open, active through routes over which fine coal actually was moving under joint rates at the same level as those applicable over alternate through routes.

The rate reduction effected on April 8, 1954, but restricted to those routes in which the Southern had its longest haul, did not close the previously existing through routes. It is quite true that shippers, ordinarily, would route fine coal over the lower rated routes rather than the higher rated routes, but though at a higher level, the joint rates over the routes of the Clinchfield and the Georgia Railroad applicable to all sizes of coal, including fine coal, remained in effect and uncancelled.

The Act provides a procedure by which a carrier may cancel a through route which is uneconomic or burdensome, but it carries the burden of proof in the hearings

that may be held upon its application. Through routes may also cease to exist because of abandonment or long neglect. Thus in Denver & Rio Grande Western R.R. Co. v. Union Pacific, 351 U.S. 321, the Court upheld the finding by an evenly divided Commission that routes were technically closed as through routes where it appeared that joint rates had been cancelled more than forty years previously and over which in the last forty years shipments could move only at much higher combination rates. The Court, however, considered the long lapse of time after the cancellation of joint rates as only one circumstance to be taken into account and its holding was only that upon the evidence the Commission was not compelled to find that the routes were still open as through routes.

Here there has been no formal cancellation of the joint rates much less of the through routes, and the time involved in comparison with the lapse of time in the Denver & Rio Grande Western case is negligible.

Through routes may be found to exist though no joint rate has ever been applicable to it. But the existence of a joint rate necessarily presupposes the existence of a through route. See United States v. Great Northern Railway Co., 343 U.S. 562.

These routes, including the Clinchfield and the Georgia Railroad as intermediate carriers, have been operated as joint routes for many years. Joint rates applicable to them had historically been at the level of the joint rates over competing routes. Shippers used them actively.

Nothing occurred on April 8, 1954, to change their character as through routes. The tariffs establishing joint rates over them remained in effect. The publication of lower rates over competing routes diverted traffic from them, but there has been no such acquiescence over an extended period of time as would imply an abandonment, by mutual agreement, of these routes as joint routes.

It would be anomalous, indeed, if a railroad, seeking the closure of a joint route, by establishing a lower rate on a competing route, could relieve itself of the burden of proof imposed upon it and transfer to the other participating carriers in the joint route the heavy burden of meeting the requirements of § 15(4) of the Act.

We conclude that there was abundant evidence to support the findings of the Commission that the Clinchfield & Georgia R.R. routes were through routes within the meaning of the Act and that the Commission could compel a reduction in the joint rates over those routes without reference to the requirements of § 15(4) of the Act. U. S. v. Great Northern Rwy. Co., 343 U.S. 562; Virginian Rwy. Co. v. U. S., 272 U.S. 658; Great Northern Rwy. v. U. S., (D. Del.) 81 F. Supp. 921, affd. 336 U.S. 933; Southern Rwy. Co. v. U. S. (E.D., Va. decided June 19, 1957)—— F. Supp.——.

That the Commission did so find is clear. Its references in its decision to these routes as "closed" was in a commerical sense only, for the Commission was emphasizing the diversion of traffic which naturally occurred as a result of the establishment of lower rates on competing routes.

The Southern also contends that even though the Commission was authorized to proceed under its rate making powers without regard to § 15(4), its action in reducing the assailed rates to the level of the joint rates voluntarily established over competing routes was unreasonable and arbitrary. However, the Commission had before it evidence that abundantly justified its finding.

The routes in which the Clinchfield and Georgia Railroad are participating carriers are shorter than alternate routes over which the lower rate applied. Car-mile revenue over these routes at the same rate is higher than over Southern's long haul routes. Southern's participation at the lower rate in fine coal shipments originating on the Chesapeake & Ohio and delivered to Southern by

the Clinchfield at Marion, N. C., or Spartanburg, S. C., while refusing to participate at the same rate in shipments over substantially the same route originated by the Louisville and Nashville, the Interstate or the Norfolk and Western was inconsistent and disruptive of long established group relationships. The assailed rates are too high to move traffic. It is clear that only by reducing the joint rates over these routes to the level of the rates over competing routes could these routes participate in the available traffic and only thereby could established relationships be restored.

We conclude that the action of the Commission was abundantly justified by the evidence before it and its findings based thereon. Board of Trade v. United States, 314 U.S. 534; Virginian Railway Co. v. U. S., 272 U.S. 658.

An appropriate order will be entered dismissing the complaint and denying the application for an injunction.

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INTERSTATE COMMERCE COMMISSION

No. 31863

AROLINA, CLINCHFIELD & OHIO RAILWAY ET AL. v. SOUTHERN RAILWAY COMPANY ET AL.

Decided November 15, 1956

int rates on fine coal, in carloads, from origin groups in eastern Kentucky and Tennessee, and southwestern Virginia, to destinations in North North Carolina and South Carolina, over specified routes, found unjust and unreasonable. Reasonable basis of rates prescribed.

M. T. Hastings, A. K. McIntyre, J. P. Fishwick, R. B. Gwathmey, nd *A. L. Holton* for complainants.

Henry J. Karison for defendants.

Roy Carson and *Osborn Lemmons* for interveners in support of mplainants.

REPORT OF THE COMMISSION

DIVISION 2, COMMISSIONERS FREAS, WINCHELL, AND MURPHY

Y DIVISION 2:

Exceptions to the report proposed by the examiner were filed by the efendants, and the complainants replied. Requested findings and xceptions not discussed in this report nor reflected in our findings or nclusions have been considered and found not justified.

By complaint filed on August 29, 1955, as amended, the complaining il carriers allege that the defendants have failed in their duty to oin in the maintenance of reasonable through rates on fine coal,[1] in rloads, from mines on the Interstate Railroad Company (hereinfter called the Interstate), the Louisville and Nashville Railroad ompany, and the Norfolk and Western Railway Company in eastern entucky, eastern Tennessee, and southwestern Virginia, to destinaons in North Carolina and South Carolina on the lines of the outhern Railway Company[2] and its connecting lines, named as deendants herein, over routes including the Carolina, Clinchfield and hio Railway (hereinafter called the Clinchfield) or the Georgia ailroad as intermediate carriers, in violation of section 1 (4) of the nterstate Commerce Act. It is also alleged that the refusal of the

[1] Fine coal is defined as that which will pass through a bar screen not exceeding ½ inches between bars, or its equivalent, a 3-inch mesh, or 3-inch round perforaon, and is commonly described as stoker, slack, steam nut, pea, or nut and slack al.

[2] Reference hereinafter to the Southern will be understood as including its connecons which are named defendants herein.

defendants to participate in reduced carload rates on fine coal from mines on the Louisville & Nashville, over routes which include either the Clinchfield or the Georgia Railroad as an intermediate carrier, denies to such carriers, operated under a common management or control, the right to their long haul, in violation of section 15 (4) of the act. In view of our conclusions herein, the latter allegation will not be further considered.

The Harlan County Coal Operators Association, composed of producers which ship coal from Kentucky to the Carolinas, and two dealers in South Carolina who purchase and receive coal from mines on the lines of the complainants, intervened in support of the complaint.

The Clinchfield interchanges traffic with the Southern at Marion, N. C., and Spartanburg, S. C., and the Georgia Railroad, at Augusta, Ga. Both the Clinchfield and the Georgia are leased jointly by the Louisville & Nashville and the Atlantic Coast Line Railroad Company.

On brief and in their exceptions, the defendants contend that the complaint does not show, nor does the evidence establish, that any legal interest of the complainants has been injuriously affected, and thus that the complaint should be dismissed forthwith. This contention cannot be sustained. The complaining carriers have a right to a determination of the lawfulness of the assailed joint through rates in which they participate and which they are unable to change without the concurrence of the defendants. Especially is such a determination called for here since shippers and consignees have intervened as parties to the proceeding.

The origins under consideration are the Harlan, Windrock, La Follette, and Jellico-Middlesboro groups in Kentucky and Tennessee, served by the Louisville & Nashville, mines in Virginia on the lines of the Interstate, and Clinch Valley group 2 in Virginia served by the Norfolk & Western. Joint rates apply on all sizes of coal from the named origin groups over the following routes: (1) To destinations in the Carolinas from the Harlan group, over the Louisville & Nashville to Dorchester Junction, Va., thence the Interstate to Miller Yard, Va., and the Clinchfield to Marion or Spartanburg, at either of which junctions interchange is made with the Southern for movement beyond; (2) to destinations in South Carolina east of Augusta, Ga., from the Harlan, Jellico-Middlesboro, La Follette, and Windrock groups, over the Louisville & Nashville to Atlanta, Ga., thence the Georgia Railroad to Augusta, and the Southern beyond; (3) to destinations in the Carolinas from mines on the Interstate, over that carrier to Miller Yard, thence the Clinchfield to Marion or Spartanburg and the Southern beyond; and (4) to destinations in the Carolinas from Clinch Valley group 2, over the Norfolk & Western to St. Paul,

Va., thence the Clinchfield to Marion or Spartanburg, and the Southern beyond.

On all sizes of coal, except fine coal, joint rates in the same amounts also apply over the following routes: (1) From the Harlan, Jellico-Middlesboro, La Follette, and Windrock groups, over the Louisville & Nashville to Knoxville, Tenn., and the Southern beyond; (2) from mines on the Interstate, over that carrier to Appalachia, Va., and the Southern beyond; and (3) from Clinch Valley group 2, over the Norfolk & Western to Norton, Va., thence the Interstate to Appalachia, and the Southern beyond. Prior to April 8, 1954, the same rates also applied on fine coal over the latter routes, but on that date such rates were reduced 35 cents per ton. As a consequence of the reduction, fine coal from the origin groups under consideration, except for a few shipments made by mistake, has not been moving over routes including the lines of the Clinchfield or the Georgia Railroad. Except for the reduced rates on fine coal, the rates referred to are on the level prescribed in *Carolina Coal Consumers Conference* v. *A. & R. R. Co.*, 270 I. C. C. 291, plus subsequently authorized general increases.

It is contended by the defendants that the routes including the Clinchfield or the Georgia are commercially closed, and that through rates on fine coal cannot be prescribed without contemporaneously prescribing through routes. A through route may be defined as an arrangement, express or implied, between connecting carriers by which they hold themselves out as offering through transportation service from a point on the line of one to a destination on the line of another. A joint rate is not essential to the existence of a thruogh route, but the establishment of joint rates presupposes through routes. As stated, joint rates are applicable on fine coal transported from the origin groups under consideration to destinations in the Carolinas, over routes which include the Clinchfield or the Georgia as intermediate carriers and the defendants as delivering carriers. It follows that the routes in question are through routes within the meaning of section 15 of the act. Nothing in that section imposes a restriction on our power to prescribe just and reasonable through rates over such routes.

The duty of carriers under section 1 of the act is twofold; namely, to establish reasonable through routes, and to publish just and reasonable rates applicable thereto. In other words, the requirement of the law is that traffic moving over established through routes shall be subject to just and reasonable through rates. The defendants have joined in the establishment of through routes embracing the Clinchfield or the Georgia, and it remains to be determined whether the joint rates on fine coal applying over such routes are just and reasonable.

All railroads participating in the handling of coal originating at mines in eastern Kentucky, eastern Tennessee, and Virginia joined

in the blanket reduction of 35 cents a ton on fine coal to all destinations in North Carolina and South Carolina, to meet the severe competition being encountered from other fuels, particularly natural gas and oil. The Southern, which serves none of the origin groups under consideration, declined to participate in reductions from those groups to destinations on the defendants' lines over routes including the Clinchfield and the Georgia. The urgency of the blanket reduction, and the necessity of maintaining relationships with other origin groups included in the adjustment, influenced the complainants to forego protesting the schedules which were published to effect the reductions. The complainants contend that the assailed joint through rates are unjust and unreasonable to the extent that they exceed the lower joint rates applicable over routes through Knoxville or Appalachia.

Routes from the Harlan group through Knoxville, over which the reduced rates on fine coal apply, are 64 and 94 miles longer to representative junctions of Spartanburg and Marion, respectively, than the routes through Miller Yard over which the assailed joint rates apply. To the same junctions, from mines on the Interstate, the lower rated routes via Appalachia are 6 and 37 miles longer than the routes via Miller Yard, and from Clinch Valley Group 2 they are 25 and 56 miles longer than the routes via St. Paul. The reduced rates also apply from the Harlan group over routes through Atlanta, with interchange at that point between the Louisville & Nashville, which originates the traffic, and the Southern. Over the latter routes the distance ranges as high as 268 miles longer to destinations in the Carolinas than over routes via Miller Yard at the assailed joint rates. The routes through Atlanta, as well as similar routes over which the reduced rates apply from the Jellico-Middlesboro, Windrock and La Follette groups, are longer to several destinations on the Southern in South Carolina than the higher rated routes which embrace the Georgia as an intermediate carrier between Atlanta and Augusta. For instance, to Allendale, S. C., the reduced rate applies over a route of 589 miles, whereas the higher assailed rate applies over a route of only 475 miles.

Car-mile revenue from the rates sought would be greater over routes including lines of the Georgia Railroad and the Clinchfield, because of the lesser mileages over such routes. For example, from the Harlan group the reduced rates, on a loading of 55 tons, yield from 49.2 to 54.7 cents a car-mile over routes via Knoxville, and from 34.9 to 47.2 cents a car-mile over routes via Atlanta, to 35 representative destinations in the Carolinas. Over routes through Miller Yard, the through rates sought to the same destinations would yield from 57.9 to 67 cents a car-mile.

Prescribed group relations of many years' standing have been isturbed, insofar as the higher rated routes are concerned, by the efusal of the defendants to join in reduced rates on fine coal over uch routes. By way of illustration, rates on fine coal from mines n the Big Sandy group in Kentucky, on the lines of The Chesaeake and Ohio Railway Company, were on the same prescribed asis as the assailed joint rates from the Harlan group until the eduction in April 1954. The defendants since that date have participated in the reduced rates from the Big Sandy group over routes f the Chesapeake & Ohio to Elkhorn City, Ky., thence the Clinchield through St. Paul and Miller Yard to Marion or Spartanburg, nd the Southern beyond to destinations in the Carolinas. However, fine coal moving from the Harlan group over the Louisville & Nashville and the Interstate to Miller Yard, thence the Clinchfield o Marion or Spartanburg and the Southern beyond to the same lestinations is subject to the assailed joint rates which are 35 cents per ton higher than those from the related Big Sandy group.

The evidence leaves no doubt that the assailed rates are too high o move fine coal from and to the points under consideration. The fact that the reduced joint rates from and to the same points were stablished for competitive reasons does not invalidate their use for comparative purposes since the competitive influence exerts equal force on all fine coal shipped from the same origins and marketed t the same destinations, however it might move. The existence of oint rates over reasonable through routes, such as those described hereinbefore, which move no traffic solely because they are higher han joint rates over other through routes, presents an anomalous ate structure. Where there is before us clear and convincing evidence that rates will produce more revenue if fixed at a lower rather han a higher level, we may take that fact into consideration in prescribing a maximum reasonable basis, for we are enjoined by the so-called rate-making rule of section 15a (2) of the act to give consideration to the "effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed."

Moreover, the defendants' action in concurring in a rate reduction over some routes and refusing to concur in the same reduction over other routes, when they had previously, and for a long period, participated in equal joint rates over all of the routes, closed to traffic the higher rated routes as effectively as if schedules had been established with that sole objective. In so doing, the defendants escaped the burden of proving that cancellation of the joint rates over through routes embracing the Clinchfield or the Georgia would be consistent with the public interest, without regard to the pro-

visions of section 15 (3) of the act. This also is a fact which we are entitled to consider in determining the issue before us.

We find that the assailed rates on fine coal, in carloads, from and to the points under consideration herein, over the described through routes embracing the Clinchfield or the Georgia Railroad as intermediate carriers, are and for the future will be unjust and unreasonable to the extent that they exceed or may exceed the joint carload rates on fine coal contemporaneously applicable over other through routes, from and to the same points, in which the defendants participate as delivering carriers. An appropriate order will be entered.

299 I. C. C.

U. S. GOVERNMENT PRINTING OFFICE: 1957

APPENDIX C

Pertinent Provisions of the Interstate Commerce Act

Sec. 1 (4). It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

Sec. 15 (3). The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition

to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

Sec. 15 (4). In establishing any such through route the Commission shall not (execept as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through routes unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report,

according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

Sec. 15 (7). Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. * * *

Sec. 15a (2). In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 558

SOUTHERN RAILWAY COMPANY, CAROLINA AND NORTHWESTERN RAILWAY COMPANY, AND STATE UNIVERSITY RAILROAD COMPANY, *Appellants,*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees.*

REPLY OF APPELLANTS TO MOTION OF UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION AND MOTION OF OTHER APPELLEES TO AFFIRM.

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December 4, 1957.

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IN THE

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SOUTHERN RAILWAY COMPANY, CAROLINA AND NORTHWESTERN RAILWAY COMPANY, AND STATE UNIVERSITY RAILROAD COMPANY, *Appellants*,

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UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*.

REPLY OF APPELLANTS TO MOTION OF UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION AND MOTION OF OTHER APPELLEES TO AFFIRM.

PRELIMINARY STATEMENT

This reply is to the Motion of the United States and Interstate Commerce Commission and the Motion of other appellees to affirm the judgment of the District Court.

The suit here involved is one to set aside an order of the Interstate Commerce Commission (a) depriving appellants of the right to their long-haul participation in through routes on fine coal from certain mining dis-

tricts to Southern Railway System destinations in North Carolina and South Carolina, without complying with the short-hauling provisions of section 15(4) of the Interstate Commerce Act, and (b) accomplishing the same purpose by equalizing, without complying with the reasonableness provisions of section 1 of the Act, the rates over the closed routes via the Clinchfield or Georgia railroads to the level of those over the open routes. The facts are stated in more detail in appellants' Jurisdictional Statement.

Under section 15(3) and (4) the Commission is authorized to require the establishment of through routes upon making certain findings which admittedly were not even attempted by the Commission in the present case, because it concluded that "through routes" were already in existence, and that the short-hauling restrictions in section 15(4) were, therefore, inapplicable.

In construing "through routes" in section 15 to mean that through routes were already in existence in the present case, the Commission brushed aside and departed from the tests which this Court has said represent a correct interpretation of the "through route" provisions of section 15(3) and (4).* These tests were as to the "holding out" by the carriers and the "through carriage" and "course of business" with respect to such routes.

In its report the Commission did not even refer to those tests but substituted a new one of its own, namely, that if a joint rate is in existence over a route, such route is a "through route". It so concluded regard-

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* See *Thompson* v. *United States*, 343 U.S. 549 (1952), and *Denver & Rio Grande West. R. Co.* v. *Union Pac. R. Co.*, 351 U.S. 321 (1956).

less of its own finding that since April 8, 1954, more than three years prior to its decision, there had been no movement of the commodity involved, fine coal, except a few shipments by mistake, and that the action of appellants "closed to traffic the higher rated routes as effectively as if schedules had been established with that sole objective" (299 I.C.C. at 339).

Tested by the statutory standards held by this Court to be proper, but not recognized by the Commission in its decision, it is believed that a realistic, common sense view of the facts leaves no doubt that the routes in question were closed, that this is in accord with the Commission's own findings that they were "closed", and that it was fundamental error to ignore the short-hauling restrictions in section 15(4) and to hold that they were inapplicable.

The error in disregarding section 15(4) alone invalidates the Commission's order. However, the attempt of the Commission to equalize rates over the closed routes with those over appellants' open long-haul routes, by resort to its power to prescribe reasonable maximum rates, is based upon erroneous grounds, invalidating its order. Section 15a(2) has been misconstrued. No finding is made that the lower rates to which equalization is required are reasonable maximum rates. There is no finding that the higher prescribed level in the former case could be ignored in favor of depressed rates over alternate routes as the result of competition. For these and other reasons referred to herein and in the Jurisdictional Statement, the order is invalid.

The misconstruction of the short-hauling provisions in the present case is highly damaging to appellants

in depriving them of their long-haul rights which Congress has expressly provided for in section 15(4)—a section with which the Commission over a period of many years has been unsympathetic and as to which it has sought unsuccessfully to have the short-hauling restrictions on its powers eliminated.

It is highly important that appellants in efficiently operating their properties and giving the public the benefit of lower rates be able to protect their long hauls, as provided in section 15(4). In this manner special low commodity rates justifiable over long-haul routes may be published in the public interest, without keeping open all routes applicable under class rates or under a generic classification such as the higher rates on "all kinds of coal" over the closed routes in the present case.

The Motions of appellees, it is respectfully submitted, should be denied.

ARGUMENT

I. CASE INVOLVES WRONG CONSTRUCTION BY COMMISSION OF SHORT-HAULING PROVISIONS OF STATUTE—NOT FACTUAL ADMINISTRATIVE FINALITY DETERMINATION

The present case is highly important because it involves an erroneous construction of the short-hauling provisions of section 15(4) of the Interstate Commerce Act, and unjustly strips appellant railroads of rights intended by Congress to be granted them and intended to be protected from administrative curtailment unless upon compliance with the requirements of this section.

Both the Government and the other appellees in their motions seek to sustain the Commission's conclusion "that the routes in question are through routes within the meaning of section 15 of the act" (299 I.C.C. at 337), and therefore section 15(4) is inappli-

cable, on the theory that the question is merely "one of fact" (Government's motion, p. 8, other appellees' motion, p. 10).

The Government, however, in view of the Commission's own finding that appellants by their tariff, effective April 8, 1954, "closed to traffic the higher rated routes as effectively as if schedules had been established with that sole objective" (299 I.C.C. at 339), said:

> "We agree that the Commission found, among other things, that * * * the routes have been effectively closed to fine coal traffic." (p. 12)

The Government then says:

> "But the Commission also found explicitly that these same routes were in existence, hence were never eliminated *in any legal sense*" (id.; Emphasis supplied).

Thus in spite of the actual factual situation that the routes in question were closed, the argument of the Government is that they were not closed in a "legal sense", which means as the Commission *construes* the statute.

While appellants recognize that it is in the public interest that an administrative agency such as the Commission should not be overturned where its discretion is exercised within statutory and constitutional limits, it is basically important in our system of government that administrative agencies be not allowed to rule on the law itself and thus be free from judicial or other restraint. The Administrative Procedure Act (5 U.S.C., section 1, et seq.) gives emphasis to this purpose.

The fundamental principle is clearly stated in *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369 (1946), where the Court pointed out that—

> "An agency may not finally decide the limits of its statutory power. That is a judicial function."

Numerous cases are cited by the Court in a footnote, including *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 489 (1942), in which an order of the Interstate Commerce Commission was held to be invalid. There the Court in recognizing the importance of the judicial function said:

> "Congress has made a grant of rights to carriers such as appellee. Congress has prescribed statutory standards pursuant to which those rights are to be determined. Neither the Court nor the Commission is warranted in departing from those standards because of any doubts which may exist as to the wisdom of following the course which Congress has chosen. Congress has also provided for judicial review as an additional assurance that its policies be executed."

See also *East Texas Motor Fr. Lines* v. *Frozen Food Express*, 351 U.S. 49 (1956), in which the Court in holding an order of the Commission invalid said that (p. 54)—

> "Congress has placed limits on its statutory powers; and our duty on judicial review is to determine those limits".

The *Nierotko case* is cited.

The Commission over a long period of time has looked with disfavor on the short-hauling provisions section 15(4) of the Act and has recommended, on

numerous occasions, elimination of the restrictions on its power to require short-hauling. As recently as 1952 the Commission supported a bill to accomplish this result. (Senate Hearings on S.2782, April 21, 1952, 82nd Cong. 2nd Sess.). In every instance Congress declined to follow the Commission's recommendations, and thus recognized and emphasized the importance of preserving the rights of railroads to their long hauls.

Misconstruction of the short-hauling provisions of section 15(4) resulted in the invalidation of the Commission's orders in *United States* v. *Missouri Pac. R. Co.*, 278 U.S. 269 (1929), and *Thompson* v. *United States*, 343 U.S. 549 (1952). In the latter case this Court pointed out that the "Commission's effort to limit by construction the impact of the short-hauling restriction on its power to establish through routes was rejected" in the *Missouri Pacific case*. The Court further pointed out attempts by the Commission to have Congress "delete completely the short-hauling restriction" and the refusal of Congress to do so (p. 555). See also the comments of Mr. Justice Frankfurter in his dissenting opinion in *Denver & Rio Grande West. R. Co.* v. *Union Pac. R. Co.*, 351 U.S. 321, 336-337 (1956).

This legislative background, appellants believe, makes it particularly important in the present case to review the Commission's order and requires compliance with the statute.

The Thompson case. Appellees seek to escape the force of this Court's decision in the *Thompson case*, 343 U.S. 549, supra, which is dealt with in some detail in the Jurisdictional Statement (pp. 16-24). They overlook that the case, like the present one, involves a

construction of the meaning of section 15(4) of the Act, and more particularly the meaning of the term "through route" in that section as distinguished from a mere factual determination. The Court said (p. 560):

> "We hold that the Commission's efforts to support its finding that a through route from Lenora to Omaha via the Burlington line already exists are *inconsistent with the meaning of the term* 'through route' as used in the Interstate Commerce Act" (Emphasis supplied).

The Court stated "the accepted tests for determining the existence of a through route" and held that applying those tests the Commission's order was "without evidentiary support" (p. 561) and its theory, if approved, would require "an unwarranted distortion of the statutory pattern" (p. 559). As to the test to apply the Court said (p. 557):

> "In short, the test of the existence of a 'through route' is whether the participating carriers *hold themselves out* as offering through transportation service. *Through carriage* implies the existence of a through route *whatever the form of the rates* charged for the through service" (Emphasis supplied).

In applying the tests, "the carrier's course of business" is to be considered (p. 557). As compared with the present case, it is to be noted:

(1) In that case, there was a physical connection between the Missouri Pacific and the Burlington over the route sought to be opened by the Commission and cars of the commodity in question, grain, could be physically hauled over the entire route. Such physical usability was held to be no basis for finding the existence of a through route. Physical usability in the

present case is likewise of no legal significance, and such a test, as the Court pointed out, would mean practical nullification of the short-hauling provisions of the Act because such contention could be made as to nearly every route in this country.

(2) The Missouri Pacific-Burlington route in the *Thompson case* was not used from Lenora, Kans., to Omaha, Nebr., because the combination rate thereover was 30 cents per hundred pounds, or 4.5 cents higher than the rate over the Missouri Pacific single-line route to Omaha, and 11 cents higher than the rate over the Missouri Pacific route to Kansas City (pp. 551, 553). The traffic did not move over the Missouri Pacific-Burlington route because of the higher rate applicable and not because of any physical condition. The route was in fact "commercially closed" by reason of the higher rates.* In the present case, as the Commission found, the rates via the Clinchfield or Georgia routes "are too high to move fine coal from and to the points under consideration" and the routes are effectively "closed" (299 I.C.C., at p. 339).

(3) In that case the fact that the Missouri Pacific single-line route to Omaha was one-third longer than the two-line route sought to be opened (278 I.C.C., at p. 520) was no obstacle to recognition of the Missouri Pacific's long-haul route. In the present case longer distances via the Southern open routes are likewise not significant.

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* See *Omaha Grain Exc. of Omaha, Nebr.* v. *Missouri Pac. R. Co.*, 272 I.C.C. 368, 371, 372, in which no movement of grain because of the higher rates is referred to, and in the later decision, 278 I.C.C., at p. 523, the Commission said, complainant "can use them [the Missouri Pacific-Burlington routes] if it elects to pay the excessive combination rates in effect over such routes".

(4) In that case the fact that grain moved under joint rates in through service over the Missouri Pacific and Burlington "to points short of Omaha" was held to be no evidence of a through route to Omaha (p. 559). In the present case the evidence as to movement of coal *other than fine coal* or of *other commodities* via the Clinchfield or Georgia routes between the points involved is no basis whatever for a through-route finding.

(5) In that case the physical availability of the Missouri Pacific-Burlington route and the 30 cent combination rate thereover did not constitute the "holding out" required to establish a through route. The rate situation was such as to forbid the movement of traffic. This was the situation as to the higher rates over the Clinchfield and Georgia routes in the present case.

(6) In that case there was no actual "carriage" of grain over the Missouri Pacific-Burlington route and such carriage was negatived by "the course of business" of the carriers involved. The same is true as to the Clinchfield and Georgia routes in the present case. While appellees seek to distinguish the two cases on the ground that in that case there had never been a movement of grain over the entire Missouri Pacific-Burlington route, the actual-carriage and course-of-business test is equally applicable in the present case, where there can be no doubt, as the Commission found, that since April 8, 1954, the routes via the Clinchfield and Georgia were "closed".

(7) While combination rates were involved in the *Thompson case,* and joint rates are involved in the present case, in that case "through carriage" was held to be a test of the existence of a through route "whatever the form of the rates charged for the through

service". With no through carriage and no actual holding out, it is immaterial that the rates via the Clinchfield or Georgia routes are joint rates.

For similar reasons the attempt of appellees to distinguish the *D&RGW case*, 351 U.S. 321, supra, is fallacious. The Court took pains in that case to reaffirm the tests set forth in the *Thompson case*. There the tests were held to have been complied with. In the present case they have not, and a misconception of the meaning of "through route" as used in section 15(4) has been substituted for such tests.

Appellees' claimed support for the through-route finding. The contentions made by the Government and other appellees that the Commission's through route finding is amply supported are similar. Particular attention here will be given to the Government's contentions.

(1) The Government contends that the Clinchfield and Georgia routes have been "recognized and utilized as through routes for the transportation of all sizes of coal, including fine coal, at joint commodity rates for many years prior to April 8, 1954" (p. 11).*

That fine coal moved over the Clinchfield or Georgia routes under the generic description, "all sizes of coal",

* In erroneously seeking to meet appellants' argument concerning class rates and rates under generic descriptions, railroad appellees argue that the route here involved "has been continuously used over a long period of time in the transportation of the commodity involved" (p. 18). The commodity here involved is "fine coal" which is a separate and distinct commodity from the generic description, coal of all sizes, applicable over the closed routes. After April 8, 1954, the closed routes were not "continuously used" in the transportation of fine coal, and the Commission so found.

prior to April 8, 1954, is of no significance. Not until April 8, 1954, did appellants close those routes and the Commission itself found that the action on that date "closed to traffic the higher rated routes [via the Clinchfield or Georgia] as effectively as if schedules had been established with that sole objective" (299 I.C.C. at 339). The Commission also found that following such action "fine coal from the origin groups under consideration, except for a few shipments made by mistake, has not been moving over routes including the lines of the Clinchfield or the Georgia Railroad" (id., p. 337). Thus in accordance with the "actual carriage" test and the "course of business" test it is clear from the Commission's own findings that after April 8, 1954, the routes in question were closed and could not be properly considered as existing "through routes". The trouble is, that the Commission threw those tests to the winds.

(2) The Government contends that "These long-standing through routes and joint rates were not cancelled by tariff publication, and both before and after April 8, 1954, joint rates on all sizes of coal, including fine coal, have been and still are in effect over them" (p. 11).

The contention that "through routes and joint rates were not cancelled" as to "all sizes of coal" overlooks that as to fine coal, the commodity here involved, the Commission itself found, as just indicated, that the routes were as effectively "closed" "as if schedules had been established with that sole objective". For all practical purposes the *fine* coal rates and routes via Clinchfield or Georgia were thus cancelled and rendered ineffective.

"Continuance after April 8, 1954, of joint rates on all sizes of coal is no support for the through-route finding. Whatever "the form of the rates", as previously indicated in dealing with the *Thompson case*, the real tests are the "holding out" and "actual carriage" or "course of business" tests. Appellants in taking "fine coal" out of the general classification of "all sizes of coal" and specifically publishing, with the consent of its connections, the lower rates on this commodity over its open routes intended that that commodity should move only over those open routes. This was clearly understood by all concerned. There was no solicitation by appellants or other carriers over the Clinchfield and Georgia routes, and, as indicated, application of "actual carriage" or "course of business" tests showed that movement of fine coal over those routes had been stopped. Irrespective of the joint rates published on the general description of all sizes of coal over the Clinchfield or Georgia routes, the opposing carriers themselves recognized in the proceeding before the Commission that the routes had been closed. This was clear also from the meager testimony of shipper witnesses (R. 156, 161, 162, 228).

Appellees try to avoid the effect of the admission in the prayer of the complaint of opposing railroads before the Commission seeking an order "requiring the *reinstatement*" of the Clinchfield and Georgia routes "*eliminated* by the action of the Southern Railway" (emphasis supplied). They overlook and fail to mention that such reinstatement of routes was sought under "section 15(3) of the Act" (see Jurisdictional Statement, p. 15). Section 15(4), of course, is to be read in connection with, and is a limitation on the Commission's powers under section 15(3). The Govern-

ment does not deny and the other appellees are unable to show error in the Jurisdictional Statement giving reference to opposing railroad testimony "that the Clinchfield and Georgia routes 'were closed', were 'commercially closed', were 'made unavailable' and were 'discontinued' (Witness Roby, R. 99, 104, 118, 187, 188, 195, and exhibit 20, column 1)." But in any event, they cannot deny that the Commission itself found that the routes were "closed".

(3) The Government further contends that the movement of sizes of coal other than "fine coal", the commodity here involved, over the Clinchfield or Georgia routes shows that such routes are through routes with respect to fine coal*.

The other appellees make a like argument (pp. 7, 13). This is indeed extraordinary reasoning. It is utterly repugnant to common sense to assume that because a through route may be open as to one commodity, for example, apples, a through route over the same lines is open as to another commodity, for example, grain. The same type of reasoning was rejected in the *Thompson case* where movements of grain over the Missouri Pacific-Burlington route under joint rates to points just short of Omaha were held not to be evidence of a through route all the way from point of origin to Omaha. Such reasoning would mean an

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* The Government contention is (p. 11):

"(3) Although the availability of lower rates on fine coal over the alternate routes since April 8, 1954, has rendered the routes via the Clinchfield or the Georgia Railroad commercially undesirable for the movement of fine coal, other sizes of coal have continued to move over them at joint commodity rates and a few shipments of fine coal have done so."

utter nullification of the short-hauling provisions of section 15(4).*

The Government in making its point (3) apparently attempts to discount the Commission's finding that the higher rated routes were "closed". It refers to those routes as "commercially undesirable" and argues "a few shipments of fine coal" have moved over those routes (p. 11). Yet on the next page the Government admits that "the routes have been effectively closed to fine coal traffic". This is necessary in view of the Commission's findings above referred to (299 I.C.C. at 339).

The Government further attempts to make a distinction on the theory that "commercially closed" means something different from the meaning of a closed through route under section 15(4). The lower Court accepted this erroneous theory.* However, it will be noted that in the *Thompson case* the routes were not physically closed but were commercially closed because

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*Railroad appellees apparently emphasizing traffic from the Harlan district on the L&N state (pp. 7-8) that during "four months of 1952 approximately 45 percent of all coal which moved to North Carolina and South Carolina from the Harlan group was routed in connection with the Clinchfield Railroad" but in a footnote concede that this "percentage includes coal destined to points not served by appellants". The exhibit relied upon (No. 34) shows that the 45 percent of the total comprised 3,471 cars in the four months shown for 1952. What was fine coal and what was other than fine coal is not shown. However, exhibit 20 submitted by an L&N witness shows that in January and February, 1954, prior to the closing of the Clinchfield route in connection with the Southern, only 85 cars moved over that route to Southern stations. This indicates the relatively small volume of fine coal traffic formerly moving via the Clinchfield route to Southern destinations here involved and the overwhelming proportion moving to destinations not here involved.

Also to be noted is the fact that the L&N from the Harlan mines has its long haul (182 miles) via the Knoxville open route as compared with a haul less than half (90 miles) if its haul were via the closed Clinchfield route (Ex. 19, p. 2).

of the higher rates over the Missouri Pacific-Burlington route and that in the *Denver & Rio Grande case* the routes held not to be through routes were shown to be "commercially" closed (351 U.S., at p. 330).*

Appellees rely upon the *Virginian case*, 272 U.S. 658. The Commission based its order which was reviewed in the *Thompson case* on that decision (278 I.C.C., at p. 523). The Government relied heavily on it in the *Thompson case* but the Court held against the contention. An opposite contention as to the applicability of the *Virginian case* was made by the Government in the *Denver & Rio Grande case*. Now the Government reverses itself and returns in substance to the erroneous contention made in the *Thompson case*. No alternate routes were involved in the *Virginian case*. Section 3, the discrimination section, was availed of by the Commission, and this makes inapplicable the short-hauling provisions of the Act. The case is no authority whatever against appellants.**

Appellees also rely on the *Great Northern case*, 343 U.S. 562 (Government pp. 11-13, other appellees, p. 13). One route was there before the Court. It was extensively utilized, and there was no alternate route. The Court said that the short-hauling provisions of the Act were not involved. The case is no authority here.

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* The Court referred to the Commission's finding that the "course of conduct" of the Union Pacific was "not [to] open *commercially* the Rio Grande routes on this traffic" (Emphasis supplied).

** The Government (p. 6) and other appellees (p. 7) argue that rate relationships between the various origin groups were destroyed by Southern's action in reducing rates on April 8, 1954. This is not true. After April 8, 1954, each of the origin groups continued to have the benefit of the 35 cent rate reduction in fine coal and continued in the same relationship, routes being open and used via Knoxville and Appalachia just as they have always been.

The other *Great Northern case*, 81 F. Supp. 921, 336 U.S. 933, involved transit privileges. The facts are so different from those here involved that the case is of no legal significance.

Both the Government and other appellees apparently recognize the weakness of their theory that the mere existence of joint rates over the Clinchfield and Georgia railroads makes them participants in existing through routes, because they resort to other arguments, such as that there was movement of coal prior to April 8, 1954, and movement of coal other than fine coal thereafter. Those arguments, as pointed out above, are also unsound.

The joint-rate theory is brought to a *reductio ad absurdum* by noting the class rate situation in respect to joint rates, referred to in the Jurisdictional Statement, pp. 21-24. Class rates apply without route restriction, and there are in this country "literally millions of routes" *Class Rates in the United States*, 294 I.C.C. 662, 666. Such joint rates having general application, like the general purpose rates on "all sizes of coal" prescribed in the *Carolina Coal Consumers case*, 270 I.C.C. 291, cannot be cancelled by a carrier publishing a lower commodity rate applicable to a particular commodity. *To hold that all of the class rate routes are open merely because joint rates are applicable thereover and that the Commission may equalize those rates with the commodity rate without regard to the short-hauling provision of section 15(4) would be devastating to the short-hauling restrictions on the Commission's power.* It would be similar to the Commission's unsuccessful attempt to hold in the *Thompson case* that physical availability of a route justifies a finding of the existence of a through route. Both theories are contrary to sound logic and common sense and do

violence to the statutory standards carefully provided by Congress.

The Commission's misconstruction of the provisions of section 15(4) of the Act, in holding that it is inapplicable, is a basic error of law rendering the Commission's order invalid.

II. FUNDAMENTAL ERRORS IN THE COMMISSION'S PRESCRIBED EQUALIZATION OF RATES UNDER THE THEORY OF ITS RATE-MAKING POWERS UNDER SECTION 1 OF THE ACT

While appellants believe that the errors of the Commission in misconstruing the short-hauling provisions of section 15(4) alone invalidate the Commission's order, and that the Court need go no further than those errors to set aside the order, nevertheless, the Commission has departed from legislative standards in prescribing rates over the closed routes on the same level as the rates over the open routes in which Southern participates in preserving its long hauls.

Appellees contend that the Commission was not in error in relying, as it clearly did, on the provisions of section 15a(2) of the Act. They overlook that the provisions as to taking into account the movement of traffic were directed towards the rate-making element of value-of-service, and have no application to an alternate route case such as the present one. The Commission itself in a previous case, *Cotton Transit at Shelby, N. C.*, 253 I.C.C. 586, reached a similar conclusion. There it was contended that extra charges over a route via Shelby, N. C., as compared with other routes to the same destinations impeded or prevented the flow of traffic via Shelby. In spite of the contention of the protestant that unreasonableness should have been

found by applying the rate-making test provided for in section 15a, the Commission found that the test was inapplicable because the traffic would continue to move via the other routes.* The Commission made plain that not just the traffic that might move over the Shelby route should be considered but instead the entire movement from origin to destination. The important consideration is as to the "total tonnage". *Reduced Rates on Coal from the East to the Northwest,* 292 I.C.C. 119, 135. The purpose is related to that of the Hoch-Smith Resolution (49 U.S.C., sec. 55) as to making rates "to the end that commodities may freely move"—not that movement may be provided over any particular routes or all routes between the same points.

The further finding by the Commission in reliance upon section 15a that "there is before us clear and convincing evidence that rates will produce more revenue if fixed at a lower rather than a higher level" (p. 339), disregards the fact that increased revenue over one route will reduce the revenue over the other route.

In addition from certain coal fields, for example, the Harlan district, the evidence showed movement of fine coal over the Clinchfield route to destinations here in-

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* The Commission said (p. 589):

"Protestant also contends that the proposed charge would not meet the *test of reasonableness found in section 15a of the act*. That section provides that, in the exercise of its power to prescribe just and reasonable rates, the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed. Even if *all* of the traffic under consideration should be diverted from Shelby because of the proposed extra charge, the record indicates that it *would continue to move* to and from warehousing points on the Southern." (Emphasis supplied).

volved, amounting in all to hardly more than one car a day for the entire district, prior to the closing of the route on April 8, 1954, and there was no showing of an increased movement if the route had been opened after that date.*

Railroad appellees contend that the words in section 15a as to the movement of traffic "by the carrier or carriers for which the rates are prescribed" indicates that the Commission had authority to rely on this section in the present case.

Those provisions, however, were added in the 1940 amendment to the Act in order to make clear another purpose, namely, that the Commission "may not require one carrier or group of carriers to maintain rates for the purpose of protecting the traffic of others". *Dressed Poultry From Omaha, Nebr., to Austin, Minn.*, 246 I.C.C. 270, 272; *Automobiles From Detroit to the East*, 288 I.C.C. 351, 356; *Merchandise Freight From Washington and Va. to South*, 270 I.C.C. 487, 493; and *New Automobiles in Interstate Commerce*, 259 I.C.C. 475, 538.

The Government argues that even if section 15a was misconstrued, this would not invalidate the order (p. 17). The report, however, shows that the Commission heavily relied upon this section, and it was evidently

* Exhibit 20 introduced by opposing railroads in the Commission proceeding purported to show the movement of fine coal from the Harlan district via the Clinchfield route to destinations on the Southern in North Carolina and South Carolina in the months of January and February, 1954. The total was *only* 85 cars of fine coal, or 1.4 cars per day for the entire district. The principal shipper witness said as to the existing Southern route: "I like it. I have no intention, even if the route is restored, of trying to get any coal routed over the other way" (R. 156).

"an important factor in the conclusions reached." The order should, therefore, be invalidated. *United States* v. *Abilene & S. Ry. Co.*, 265 U.S. 274, 290 (1924).

Appellees rely on the *Virginian case* in support of the prescription of the lower rates by the Clinchfield and Georgia routes. In that case, however, as pointed out in the Jurisdictional Statement, it is highly significant that the Commission expressly found that the compared rates "afford a standard of reasonableness" (98 I.C.C. 488, 496), while there is utterly lacking here any finding that the lower rates to the level of which reductions were required are *reasonable maximum rates.* Absence of such a finding is a fatal flaw in the report and order here in question. There can be no dispute that in the exercise of its managerial discretion a railroad is free to establish rates which are lower than reasonable maximum rates but which the Commission itself may not require (*United States* v. *Chicago, M., St., P. & P. Co.*, 294 U.S. 499, 506 (1935)).

The absence of a finding that the reduced rates are maximum reasonable rates is a particularly serious error, because the rates on all sizes of coal, including fine coal, over the Clinchfield and Georgia routes were prescribed by the Commission in the *Carolina Coal Consumers Conference case*, 270 I.C.C. 291, and no finding was made that departure from the rates prescribed therein is justified or that the rates thus prescribed are above reasonable maximum rates.* The

* The railroad appellees contend (p. 25) that the Commission in certain coke cases made reductions from earlier levels prescribed and that such action indicates that the Commission could do so in the present case. Unlike the present case, however, the Commission in those cases took pains in prescribing the lower rates to vacate the previous orders in so far as they were in "conflict with"

standard of reasonableness there prescribed is still the standard of maximum reasonableness.*.

Appellees apparently do not deny the general rule of the Commission as to alternate routes by railroad—a rule violated here. The Commission has repeatedly held "that the existence of a lower rate between the same points over a route other than the route of movement does not of itself establish the unreasonableness of the higher rate" *McHenry-Millhouse Mfg. Co.* v. *N. Y., O. & W. Ry. Co.*, 151 I.C.C. 501, 502.**

The Government cites a number of cases (p. 16) as to rate comparisons but none of these involved alternate rail route comparisons.

The Commission's order is also violative of the well-recognized principle that rates depressed because of

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or "inconsistent with" the order prescribing the lower rates (194 I.C.C. 640, 679; 208 I.C.C. 281, 290).

The railroad appellees also seek to rely upon the *Class Rate case*, 262 I.C.C. 447, 264 I.C.C. 41, involving a change from merely ad interim rates on a comprehensive record as to costs, traffic movement, and other facts, as compared with the superficial and generalized treatment given the present case.

* Railroad appellees argue that there is something "anomolous" in the closing of a route which has been a rate-making route. This overlooks the well established principle "that carriers cannot be required to short haul themselves" and "that a rate-making route need not be an open route". *Routing via Hampton & B. R.*, 148 I.C.C. 547, 551.

** Among numerous other cases to the same effect, see *Armstrong Tire & Rubber Co.* v. *Illinois Central R. Co.*, 289 I.C.C. 635, 636; *A. C. Jensen Rock & Supply Co.* v. *C., M., St. P. & P. R. Co.*, 273 I.C.C. 399, 401; and *Brennan & Corrigan* v. *Chicago & N. W. Ry.*, 155 I.C.C. 214.

competitive influences, the situation here, are not a proper measure of a maximum reasonable basis.*

The arbitrary and invalid character of the Commission's rate finding is further indicated by the apparent impatience of the Commission, on an erroneous theory, that appellants had escaped the burden of proof, and that this was a good reason for finding against them. The Government apparently makes no answer to this contention. The Commission could not lawfully penalize appellants and thus circumvent the statute when there was no suspension proceeding and in fact the burden of proof was on others (Jurisdictional Statement, pp. 30-31).

For the reasons stated in the Jurisdictional Statement and in this Reply, it is respectfully submitted that the order of the Commission is invalid under the rate-making provisions of the Act, as well as invalid in respect to the short-hauling provisions of section 15(4).

CONCLUSION

This case is one of great importance to appellants. They believe that fundamental errors have been committed by the Commission and that its order is invalid as involving a misconstruction of the Interstate Commerce Act, arbitrary action beyond its statutory powers, and a startling disregard of statutory standards.

Opposing railroad appellees having long since in large measure restricted their routes (e.g., L&N single-

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* See *Whatcom County Traf. & Rates Bur.* v. *C., M., St. P. & P. R. Co.*, 287 I.C.C. 442, 443 (competition of substitute fuels); *J. G. Christopher Co.* v. *Atlantic & D. Ry. Co.*, 289 I.C.C. 716, 718 (water competition); *Seaboard Mills* v. *Alabama G.S.R. Co.*, 293 I.C.C. 7, 13 (truck and water competition); and *Park Drop Forge Co.* v. *Pittsburgh & L. E. R. Co.*, 288 I.C.C. 405, 408 (water-truck competition).

line routes from mines to the Ohio River and to Atlanta, R. 152, 200) unjustly object to the restriction in routing here involved, although failing to protest such restriction before the tariff became effective.

They in substance oppose the Congressional purpose to provide protection of the common law right of railroads to long-haul participation—a purpose which they supported in opposition to one of the many attempts made by the Commission to eliminate the short-hauling provisions of section 15(4).

In April, 1938, an official of the Atlantic Coast Line, speaking for a number of railroads, including the railroad appellees here and also the Southern Railway, urged before a House Committee*—

> "We cannot with any reasonable assurance hold out to render the most expeditious service if our managerial rights are impaired, as will be the case if this bill is enacted" (p. 173).

Referring to freight handled by the Atlantic Coast Line he said:

> "The operation of our system presupposes the assurance of its long haul. The freight schedules and operations of trains are arranged on that presumption. Our rails are intersected by other lines at short intervals. One cannot travel as much as 75 miles on the Coast Line without crossing the tracks of another railroad. If we should be forced to participate with these other railroads in joint routes on traffic which we can handle more economically, more efficiently, and more expeditiously via our long-haul junctions, merely because we happen to connect with such other railroads for

* House Hearings on S. 1261, April, 1938, 75th Cong. 2nd and 3rd Sess.

entirely different purposes, it would simply undermine the premise upon which the Coast Line system was crystallized. * * *

"Because of competition with motor truck and water transportation, the Coast Line has been compelled to make very drastic reductions in the rates prescribed by the Interstate Commerce Commission on citrus fruit from Florida to points on the North Atlantic Seaboard and because of the low level of these reduced rates it is more necessary than ever that we be assured of our long haul on this traffic."

Congress did not eliminate the short-hauling provisions as proposed but in 1940 revised section 15(4) in its present form. The purpose of that section, as well as its terms, has been misconstrued and erroneously disregarded by the Commission in the present case.

The Motions of Appellees to affirm, appellants respectfully submit, should, therefore, be denied, the case should be considered by the Court on briefs and oral argument, and the Commission's order should be held to be invalid.

Respectfully submitted,

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December 4, 1957.

PROOF OF SERVICE

I, R. Granville Curry, one of the attorneys for appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 4th day of December, 1957, I served copies of the foregoing reply on the several parties hereto, as follows:

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(2) On the Interstate Commerce Commission by mailing copies duly addressed with first-class postage prepaid to—

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IN THE

Supreme Court of the United States

October Term, 1957.

SOUTHERN RAILWAY COMPANY, Et Al.,
Appellants,

versus

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, Et Al.,
Appellees.

No. 558.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

MOTION OF APPELLEES, HARLAN COUNTY COAL OPERATORS ASSOCIATION, ATLANTIC COAST LINE RAILROAD COMPANY, INTERSTATE RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, AND NORFOLK AND WESTERN RAILWAY COMPANY, TO AFFIRM

AND

BRIEF IN SUPPORT OF THE MOTION.

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IN THE

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SOUTHERN RAILWAY COMPANY, Et Al.,
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versus

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Appellees.

No. 558.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

MOTION OF APPELLEES, HARLAN COUNTY COAL OPERATORS ASSOCIATION, ATLANTIC COAST LINE RAILROAD COMPANY, INTERSTATE RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, AND NORFOLK AND WESTERN RAILWAY COMPANY, TO AFFIRM

AND

BRIEF IN SUPPORT OF THE MOTION.

I.

THE MOTION.

Harlan County Coal Operators Association, Atlantic Coast Line Railroad Company, Interstate Railroad Company, Louisville and Nashville Railroad Company, and Norfolk and Western Railway Company, appellees

> of through routes we need not determine. We are satisfied, however, that the evidence before the Commission did not compel it to make such a finding and that its conclusion that the through routes claimed were not in existence is supported by substantial evidence.

Here, as there, the Commission's judgment on such a technical question is plainly entitled to great weight and should not be disturbed unless found to be clearly erroneous. Cf. *Board of Trade* v. *United States*, 314 U. S. 534, 546–548.

With respect to appellants' contention, the Commission correctly defined the term through route[3] and found (299 I. C. C. at 337):

> It is contended by the defendants that the routes including the Clinchfield or the Georgia are commercially closed, and that through rates on fine coal cannot be prescribed without contemporaneously prescribing through routes. A through route may be defined as an arrangement, express or implied, between connecting carriers by which they hold themselves out as offering through transportation service from a point on the line of one to a destination on the line of another. A joint rate is not essential to the existence of a through route, but the establishment of joint rates presupposes through routes. As stated, joint rates are applicable on fine coal transported from the origin groups under consideration to destinations in the Carolinas, over routes which include the Clinch-

[3] See the definitions of through route in *Denver & Rio Grande W. R. Co.* v. *United States*, 351 U. S. 321, 327; *Thompson* v. *United States*, 343 U. S. 549, 556–557; *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136, 139, n. 2.

field or the Georgia as intermediate carriers and the defendants as delivering carriers. It follows that the routes in question are through routes within the meaning of section 15 of the act. Nothing in that section imposes a restriction on our power to prescribe just and reasonable through rates over such routes.

Ample support for the Commission's findings is provided by the following undisputed facts:

(1) The routes embracing the Clinchfield or the Georgia Railroad have been recognized and utilized as through routes for the transportation of all sizes of coal, including fine coal, at joint commodity rates for many years prior to April 8, 1954.

(2) These long-standing through routes and joint rates were not cancelled by tariff publication, and both before and after April 8, 1954, joint rates on all sizes of coal, including fine coal, have been and still are in effect over them.

(3) Although the availability of lower rates on fine coal over the alternate routes since April 8, 1954, has rendered the routes via the Clinchfield or the Georgia Railroad commercially undesirable for the movement of fine coal, other sizes of coal have continued to move over them at joint commodity rates and a few shipments of fine coal have done so.

As the court below (J. St. 6a) and the Commission (299 I. C. C. at 337) pointed out, while a joint rate is not essential to the existence of a through route, the presence of joint rates necessarily presupposes through routes. The obvious truth of this proposition was recognized by the Court in *United States* v. *Great Northern Ry. Co.*, 343 U. S.

562, 574, where it said that "joint rates published by two or more carriers are by definition always applicable to a through route over the lines of those carriers * * *." The existence of joint commodity rates on all sizes of coal, including fine coal, applicable over the Clinchfield and the Georgia Railroad routes constitutes an express holding out by tariff by the participating carriers that the routes exist and are available for the through transportation of such coal at the published rates.

There remains appellants' claim that the complainants before the Commission admitted that the routes in question have been "eliminated," "closed," and "discontinued" and that the Commission found them to be "closed" (J. St. 14–15). Appellants appear to be suggesting that both the complainants and the Commission agreed with appellants' position that the routes were no longer in existence as through routes. In this, appellants are in error.

We agree that the Commission found, among other things, that, as a consequence of the rate reduction, only a few shipments of fine coal have been moving over the higher rated routes, and the routes have been effectively closed to fine coal traffic. But the Commission also found explicitly that these same routes were in existence, hence were never eliminated in any legal sense. The lower court was clearly correct in saying (J. St. 7a):

> That the Commission did so find is clear. Its references in its decision to these routes as "closed" was in a commercial sense only, for the Commission was emphasizing the diver-

sion of traffic which naturally occurred as a result of the establishment of lower rates on competing routes.

So far as the complaint filed with the Commission is concerned, we submit that a fair reading of it in its entirety leaves no doubt that complainants were speaking of the commercial closing of routes due entirely to the fact that the availability of lower rates over other routes made it economically impractical for shippers to utilize the higher rated routes for the shipment of fine coal. The words "reinstatement" and "eliminated" must be, and were, interpreted in this context. The failure of appellants to join in the maintenance of reasonable through rates over these routes as required by Section 1 (4) of the Act was specifically stated as a ground for relief.

In short, the uncontroverted evidence of record shows that the routes via the Clinchfield or the Georgia Railroad are established through routes over which joint commodity rates apply on coal, including fine coal, and over which the participating carriers, including appellants, must transport coal so routed at the applicable rates. We submit that the Commission's finding that the routes are existing through routes is fully justified, if not compelled, by the facts, and was properly upheld by the court below. This being so, the power of the Commission to prescribe just and reasonable rates is in no way limited by Section 15 (4) of the Act. *United States* v. *Great Northern Ry. Co.*, 343 U. S. 562; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658; *Great Northern Ry. Co.* v. *United States*, 81 F. Supp. 921 (D. Del.), affirmed,

336 U. S. 933; see *Thompson* v. *United States*, 343 U. S. 549, 556.

2. Appellants next contend that the Commission departed from statutory standards and acted arbitrarily in requiring the assailed rates on fine coal via the Clinchfield and Georgia Railroad routes to be reduced to the level of the fine coal rates voluntarily established over the competing routes (J. St. 7–9, 25–32).

After noting that the law requires that traffic moving over established through routes shall be subject to just and reasonable rates (299 I. C. C. at 337),[4] the Commission made a series of subsidiary findings and ultimately concluded (*id.* at 340):

> We find that the assailed rates on fine coal, in carloads, from and to the points under consideration herein, over the described through routes embracing the Clinchfield or the Georgia Railroad as intermediate carriers, are and for the future will be unjust and unreasonable to the extent that they exceed or may exceed the joint carload rates on fine coal contemporaneously applicable over other through routes, from and to the same points, in which the defendants participate as delivering carriers.

That the supporting findings, detailed at pages 337–340 of the report, are amply supported by the evi-

[4] In pertinent part, Section 1 (4) of the Act provides:

"It shall be the duty of every common carrier subject to this part * * * to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto * * *."

dence cannot be seriously disputed. (See the statement, of facts, *supra,* pp. 4–7.) In addition to findings of background facts, the Commission made the following key findings:

(1) The routes from the origin mines over which the reduced fine coal rates apply are longer than the alternate routes over the Clinchfield to which the assailed joint rates apply, and routes through Atlanta to South Carolina destinations which take the reduced rates are longer than the higher rated routes which embrace the Georgia Railroad as an intermediate carrier between Atlanta and Augusta.

(2) Were the reduced rates made applicable to all routes, car-mile revenues would be greater over the Clinchfield and the Georgia Railroad routes due to the shorter distances.

(3) Prescribed group relationships which have existed for many years have been disturbed, insofar as the higher rated routes are concerned, by the refusal of appellants to join in the reduced fine coal rates over those routes. (See the statment of facts, *supra,* pp. 6–7.)

(4) The assailed rates are too high to move fine coal traffic.

(5) In ascertaining the reasonableness of the assailed rates, the reduced joint rates may be validly used for purposes of comparison. This is so even though the reduced rates were established for competitive purposes, since the competitive influence exerts equal force on all fine coal shipped from the same origins and marketed at the same destinations, however it may move.

We submit that the lower court was correct in holding that "the action of the Commission was abundantly justified by the evidence before it and its findings based thereon" (J. St. 8a).

Appellants appear to argue that once the Commission has prescribed a maximum level of rates on coal of all sizes applicable over all routes here involved, it may not thereafter prescribe a lower rate on fine coal over certain of those routes even though the carriers themselves, in recognition of a changed competitive situation, have established the same lower rate over the remainder (J. St. 26–29). But the rate making process is not so inflexible as appellants would have it. Cf. *Board of Trade* v. *United States*, 314 U. S. 534, 546.

In initiating the rate reduction, the carriers must have considered that the lower rate was just and reasonable, even necessary, under the circumstances, and that the prior prescription of a maximum reasonable rate interposed no barrier to the reduction. As participants in the reduction, appellants were obviously of the same mind.

The propriety of using lower rates voluntarily established as evidence of reasonableness has long been recognized by this Court and by the Commission. *E. g., Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 666; *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 565; *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U. S. 136, 145; *Auburn Mills* v. *Chicago & A. R. Co.*, 222 I. C. C. 495, 497; *Sheridan Chamber of Commerce* v. *C., B. & Q. R. R. Co.*, 26 I. C. C. 638, 647 and 28 I. C. C. 250, 257. The simi-

larity in essential features between the present case and the *Virginian Ry. Co.* case, *supra,* is striking; and in our view, the Court's reasoning and conclusions at pages 665–666 are dispositive here.

Appellants' other contentions are equally without merit. The Commission's reference to Section 15a (2) was not error. The "effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed" is clear. To the extent that equalization of the fine coal rates would again encourage coal to move over all routes, the same carriers would participate in the traffic as did so over the lower rated routes. In addition, the excluded carriers would again have the opportunity to participate in traffic which they enjoyed prior to the rate reduction of April 8, 1954.[5] And, as the Commission recognized, car-mile revenues would actually be higher for all of the participating carriers over the Clinchfield and Georgia Railroad routes due to their shorter length.

Moreover, even should appellants be correct in their contention that Section 15a (2) is not applicable, we submit that this would not be ground for reversal. Quite apart from that section, the conclusion here is fully justified and amply supported by adequate findings based upon substantial evidence.

---

[5] Admittedly, the appellants' hauls over the Clinchfield and Georgia Railroad routes would be shorter than over the other routes. But there is no principle of law which requires that a carrier must receive its longest possible haul, especially when it does not originate the traffic, at the cost of denying to other carriers any haul at all.

Appellants suggest that there are a greater number of exchanges required over certain of the higher rated routes than over routes taking the reduced rates. But they participate in the reduced rates from the Big Sandy mines over routes of the Chesapeake & Ohio to Elkhorn City, Kentucky, thence the Clinchfield through St. Paul and Miller Yard, Virginia, to Marion or Spartansburg, and the Southern beyond. Also, interchanges are the same in number from mines on the Norfolk and Western over the route taking the reduced rates and the route denied them.

CONCLUSION

We submit that the decision below is clearly correct and that this case presents no substantial question. The judgment of the district court should be affirmed.

Respectfully submitted.

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NOVEMBER 1957.

U. S. GOVERNMENT PRINTING OFFICE 1957

The *Thompson* case arose from an order wherein the Commission required the establishment of a joint rate over a through route via the Burlington and Missouri Pacific railroads in the transportation of grain from Lenora, Kansas, and other points to Omaha, Nebraska. This court held that there was no *evidence that any shipments had ever been made or through service ever offered* from Lenora to Omaha via the Burlington and Missouri Pacific railroads,[1] and that only local rates applied over each road to the junction with the other.[2] The Commission's order which had found that a through route did exist was consequently set aside. Obviously, such a state of facts is in no way comparable to the facts of this case. Here the record shows beyond question that joint rates and through routes have long been available and have moved a substantial volume of coal.

Nor can anything which this Court held in the *Denver and Rio Grande* case support appellants' contention. There, a finding of the Commission that through routes did not exist was upheld. After holding that the Commission's finding would not be disturbed if supported by substantial evidence, this Court proceeded to relate the pertinent facts upon which the Commission made its finding. Significant is that joint rates over the assailed routes had been cancelled between 1906 and 1913, leaving only higher combination rates to apply on the movement of various commodi-

[1] 343 U. S. at p. 551.
[2] 343 U. S. at p. 558.

ties,[3] which situation had not been changed at the time the Rio Grande filed its complaint with the Commission in 1949.[4] In other words, there, unlike the situation here, joint rates were not in effect, and had not been in effect for many years.

It is of importance to note also that the Commission in its report and order in that case was evenly divided, 5 and 5, with one member not participating, on the question of the existence of through routes.[5]

Appellants undertake (Ju. St. pp. 21-23) to draw an analogy between class rates and class routes, and reductions thereunder in the form of commodity rates, on the one hand, and the facts existing in this case, on the other. They say, if the Commission's order is upheld, then the result would be that, in any instance where certain carriers seek to reduce rates below the class-rate level by publication of specific commodity rates, all carriers participating in routes over which class rates apply would be entitled to a reduction of their rates over such routes.

There is no real analogy in the two situations. Here we are dealing with reductions in commodity rates, over a limited number of routes. Here appellants have tried to prevent the reductions from being made over the most direct routes, via which a substantial volume of traffic has always moved and which routes have been an integral part of the coal rate structure in the involved territory.

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[3] 351 U. S. at p. 328.

[4] 351 U. S. at p. 328.

[5] *Denver & R. G. W. R. Co.* v. *Union P. R. Co.*, 287 I. C. C. 611 (1953).

The validity of any such comparison, moreover, is essentially a question for consideration by the Commission, not the courts. Howbeit, there is nothing in the Interstate Commerce Act which would prohibit other carriers, which have continuously moved the hypothetical traffic mentioned at class rates over the through class-rate routes, from obtaining a rate reduction over such through routes, so long as such other carriers can prove the class rates unreasonable to the extent that they exceed the new reduced commodity rates. Certainly publication of such commodity rates would not automatically close all existing through routes. There is no basis in logic or law for saying unequivocally that a class-rate route, or other published tariff route, is not a through route, particularly if, as here, that route has been continuously used over a long period of time in the transportation of the commodity involved.

Appellants further contend (Ju. St. p. 15) that the appellee carriers' complaint before the Commission, the testimony of the witnesses, and the order of the Commission itself, indicate that appellants' limited concurrence in the rate reduction "closed" the Clinchfield and the Georgia Railroad routes.

Appellee railroads' complaint before the Commission did contain the prayer set forth in appellants' Jurisdictional Statement (p. 15). This complaint, however, also contained the following allegation:

> "That by reason of the facts stated in the foregoing paragraphs the defendants herein have failed in their duty to maintain reasonable through

rates as required under Section 1(4) of the Interstate Commerce Act." (p. 4)

And it is upon that allegation that appellees' case was predicated. The theory on which the case was tried before the Commission is conclusively shown in appellants' Exceptions to the Recommended Report and Order of the Commission's Hearing Examiner where at page 3 appellants themselves said:

". . . In agreeing to publish the 35-cent rate reduction, Southern Railway restricted application of the reduced rates to routes via Knoxville and Appalachia, thus effectively and commercially closing the other routes via the Clinchfield Railroad and the Georgia Railroad from the same origin. *The complaints* [sic] *seek a parity of rates, not the reopening or reestablishment of the closed routes.*" (Emphasis added)

Appellants refer (Ju. St. p. 15) to several statements of record by appellees' witness Roby about the involved routes being "closed", and to other expressions of similar import, but a reading of the testimony of the witness shows clearly that he was referring to such routes as being "commercially closed", as distinguished from non-existence of through routes. This may be seen in the following:[6]

". . . However, these rates that were reduced April 8, 1954, which are confined to fine coal, do not apply over routes other than those routes which afford the Southern Railway its longer haul from the first junction where it interchanges traffic with

[6]Tr. 104.

the originating railroad. Where rates are lower over one route than over another, the higher rated route is commercially closed, as from a praccical [sic] standpoint it is never used except by mistake."

The testimony of appellants' principal witness (Adcock) further illustrates the baselessness of appellants' position, the following being from his cross-examination:[7]

"Q. You say those routes were cancelled. Do you mean the routes were cancelled, or do you mean that the fine coal rates were made non-applicable over those routes?

A. What you just said, I think, Mr. Hastings, is probably the more accurate way to express the idea.

Q. I don't want to labor this point, but, on page 3, in the second literary paragraph, you use the word routes 'closed.' More accurately, that would be that the fine coal rates, reduced fine coal rates, were made non-applicable over those routes?

A. That is true. I [sic] was with the thought that it was commercially closed because of the difference of the two rates."

This Court recognized the validity of this distinction in *Thompson* v. *U. S.*, *supra*, 343 U. S. 549, where, in a footnote at page 560, it stated:

"[15]*Virginian R. Co.* v. *United States*, 272 U. S. 658 (1926), is inapposite since through routes were there found to be in existence but *commercially*

[7]Tr. 281.

closed solely because of unreasonable and discriminatory rates charged by the Virginian over its portion of the route. . . .'" (Emphasis added)

Similarly the Commission's statement that appellants' action "closed to traffic the higher rated routes as effectively as if schedules had been established with that sole objective,'"[8] relates solely to a commercial closing of the routes.[9]

What appellants undertook to do was to take advantage of a critical situation where general rate reductions had to be made, in which shippers and railroads alike had vital interests and where these appellees could not, without great harm to themselves, seek suspension of the schedule containing the route restrictions since it published also the reduced rates. By such tactics appellants sought to accomplish effective route cancellation without subjecting themselves to the burden of proof which rests upon them under Section 15(3) of the Interstate Commerce Act,[1] and to escape the responsibility of proving that the cancellation of through routes will be consistent with the public interest.[2]

Appellants' position in this case is simply that they have the exclusive right, superior to that of any other

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[8] 299 I. C. C. at p. 339.

[9] As the Court below expressly held, 157 F. Supp. at p. 61:

"... Its references in its decision to these routes as 'closed' was in a commercial sense only, for the Commission was emphasizing the diversion of traffic which naturally occurred as a result of the establishment of lower rates on competing routes."

[1] 54 Stat. 911, 49 U. S. C. 15(3).

[2] Please see decision of the Court below, 57 F. Supp. at p. 61, and Report of the Commission, 299 I. C. C. at pp. 339, 340.

railroad, including those which originate the traffic, to determine the routes over which the fine coal shipments here involved shall move. They have exercised this self-determined prerogative in connection with these reduced fine-coal rates to the point where they seek to deprive the Louisville and Nashville Railroad from feeding traffic to its leased lines, the Clinchfield and the Georgia Railroad; they have sought to deprive the Interstate Railroad of its long haul,[3] even though that carrier originates the traffic; and they have sought to determine for the Norfolk and Western, also an originating line, the junction at which appellants will accept fine coal movements.

Appellants fail to recognize that the cancellation of established through routes is not a subject to be treated adjunctively with the publication of a general rate revision. Such cancellation is a matter for consideration and determination by the Commission as a separate and distinct subject. In *A. T. & S. F. Ry.* v. *United States*, 279 U. S. 768, 776-777 (1929), this Court held:

> "The broad power to pass on the reasonableness of rates conferred upon the Commission in 1887 has not been in terms limited by any amendatory act. On the other hand, there has been much legislation designed to make the power more effective. The special power to establish through routes and joint rates was not conferred until 1906. Act of June 29, 1906, c. 3591, §4, 34 Stat. 584. There is not in that Act as amended, see *United States* v.

[3] Ex. 30 (Tr. 237, 265).

American Express Co., 265 U. S. 425, 430, note 2, or in any decision of this Court construing it; or in any of the decisions of the Commission applying it, to which attention has been called, the slightest basis for the suggestion that in conferring the restricted power to establish through routes, Congress intended to limit the theretofore unrestricted power of the Commission to pass upon the reasonableness of rates. . . ."

The final sentence[28] in Section 15(3) of the Interstate Commerce Act makes it abundantly clear that the cancellation of a through route is to be made by schedules specifically published for that purpose. The Court below recognized this principle, in holding:

> "The Act provides a procedure by which a carrier may cancel a through route which is uneconomic or burdensome, but it carries the burden of proof in the hearings that may be held upon its application. . . ." (153 F. Supp. at p. 60)

When, therefore, a railroad seeks to accomplish, as a part of a readjustment of a general rate structure, the commercial destruction of established through routes via which joint rates have applied for many years, in such circumstances as are present here, clearly it has not in law or in fact cancelled such routes.

---

[28] Reading: ". . . If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section."

Question 2 Presents No Substantial Question.

Question 2 is whether the Commission departed from statutory standards and failed to make appropriate preliminary findings in determining that the rates on fine coal via the Clinchfield and the Georgia Railroad routes were unreasonable to the extent that such rates exceeded those applicable over appellants' long-haul routes.

The scope of judicial review of any such question is very limited. Accordingly, this Court said in *Virginian Ry.* v. *United States, supra,* 272 U. S. 658:

> ". . . The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal 'informed by experience.' *Illinois Central R. R. Co.* v. *Interstate Commerce Commission,* 206 U. S. 441, 454. This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it. *Interstate Commerce Commission* v. *Union Pacific R. R. Co.,* 222 U. S. 541. . . ." (272 U. S. 658, 665-666)

Please see also: *United States* v. *Pierce Auto Lines,* 327 U. S. 515, 536 (1946); *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474, 488 (1951). The Commission's order here under attack must be examined in light of those governing principles.

Appellants contend (Ju. St., p. 26) that the Commission could not properly prescribe reductions in rates on fine coal below the level it prescribed in 1948 for all sizes

of cost. Such an argument ignores the essential nature of the Commission's rate-making function. This Court in *Board of Trade* v. *United States*, 314 U. S. 534, 546 (1942), held:

> "The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems."

The Commission in many cases, due to changing economic and competitive conditions, has prescribed rates to replace those it had previously prescribed. Notable among these decisions are *Coke Between Points in Central and Illinois Territories*, 194 I. C. C. 640 (1933), and *Coke from Alabama and Tennessee to Central Territory*, 208 I. C. C. 281 (1935) and 215 I. C. C 384 (1936), in which the Commission prescribed three successively lower bases of rates within a period of three years on coke from producing points in the South to the North. That action was approved by this Court in *B. & O. R. Co.* v. *U. S.*, 304 U. S. 58 (1938). In *Class Rate Investigation, 1939*, 262 I. C. C. 447 (1945), and 264 I. C. C. 41 (1945), the Commission, due to changes in economic and competitive conditions, equalized all class-rate structures east of the Rocky Mountains, although it had earlier prescribed comprehensive but different levels of class rates in the East, in the South and in several rate-territories west of

the Mississippi River and east of the Rockies. That action also received the approval of this Court—in *New York* v. *United States,* 331 U. S. 284 (1947). Please see also *Commonwealth of Kentucky* v. *Illinois Central R. Co.,* 259 I. C. C. 259 (1944), and *Coal Operators Asso.* v. *Baltimore and O. R. Co.,* 161 I. C. C. 3 (1930).

The involved rates are an integral and vital part of a general structure of rates on coal from the producing fields to the Carolina territory. Some of the very routes involved have played an important part in the established rate relationships between the various origin groups.[4] Therefore, for the same level of rates not to apply over such routes as applies over more circuitous routes results in the anomalous situation of the rate-making routes, or the routes responsible for the measure of the rate differentials, not being available for the movement of the traffic. In other words, but for the distances over the Clinchfield routes here involved, appellants would probably be required to maintain higher rates over their long-haul routes.

Indicative of the destruction of the rate relationships caused by appellants' action is appellants' participation in the fine coal rate reduction from the Chesapeake & Ohio Railway Big Sandy group of mines

[4] *Bituminous Coal Rates to the Southeast, supra,* 37 I. C. C. 652 (1915), *Coal from Louisville and N. R. Points,* 172 I. C. C. 704 (1931), and *Corporation Commission of N. C.* v. *Aberdeen and R. R. Co.,* 200 I. C. C. 571 (1934), show that the route of the Clinchfield has played a most important part in the construction of the rate relationships from the various origin groups, and that the relationships between a number of those groups would doubtless be different, and less favorable from the standpoint of appellants' long-haul routes, but for the Clinchfield route.

in West Virginia over the route in which the Clinchfield handles traffic from Elkhorn City, Ky., to Marion, N. C., or Spartanburg, S. C.[5] Prior to April 8, 1954, the rate on fine coal, as on other coal, was the same from the Big Sandy group over the Clinchfield route as the rate from the Louisville and Nashville Harlan group of mines via the Clinchfield route, notwithstanding that the distance from the Big Sandy group averages about 11 miles greater than from the Harlan group via the Clinchfield route.[6] The refusal of the Southern to concur in the rate reduction from the Harlan group over the Clinchfield route resulted in a 35-cent lower rate from the Big Sandy group than from the Harlan group via the Clinchfield route. The Commission cited this situation.[7] It is but one of many considerations which clearly showed that the rates over the routes in issue were unreasonable to the extent they exceeded the rates over appellants' long-haul routes and that the Commission's finding to that effect was well supported.

The Commission's finding was further supported by the fact that the shortest routes from all origins to destinations involved are via the Clinchfield and that the routes via the Georgia Railroad in all instances are shorter than the Southern Railway's long-haul routes through Atlanta. Therefore, as the Commission found,[8] in all cases the car-mile and ton-mile earnings from the same measure of rates would be greater over such routes than over appellants' long-haul routes.

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[5]Tr. 113, 114, Ex. 14 (Tr. 114, 215).

[6]*Ibid.*

[7]299 I. C. C. at p. 399.

[8]299 I. C. C. at p. 338.

Appellants seek (Ju. St. p. 26) to create the impression that they made the reductions in the fine coal rates, when the fact is that they could not alone have reduced a single rate involved in this case. Any reductions in such rates from the involved origins, of necessity, rested primarily with the originating carriers; appellants could only concur or not concur in the reductions proposed. Furthermore, the reductions were made from all group mines which ship fine coal to the Carolina territory. No single carrier or group of carriers controlled this reduction.

Proceeding from the erroneous premise that appellants made the reduction in the fine coal rates, they contend (Ju. St., pp. 26, 27) that the Commission erred in not recognizing the realm of appellants' managerial discretion. There is, to be sure, as appellants say (Ju. St., p. 27), a zone of reasonableness within which carriers ordinarily, in their managerial discretion, are entitled to reduce rates below the level prescribed by the Commission. However, the managerial discretion of all railroads participating in this traffic manifested itself in favor of the 35-cent reduction in the rate on fine coal. Appellants here seek to superimpose their managerial discretion upon that of all other carriers involved in this case by attempting to dictate over which routes this rate reduction should apply, even though appellants do not originate the traffic. The Commission is not powerless to deal with such a situation under section 1(4) of the Interstate Commerce Act as the argument implies. Nothing in the *New York*

Central case,[9] cited by appellants, holds that the Commission, upon complaint of carrierr and shippers, cannot order reductions in rates over through routes so long as the Commission makes adequate findings supported by substantial evidence that such rates are unjust or unreasonable in violation of Section 1(4) of the Interstate Commerce Act.

Appellants' contention (Ju. St. p. 28) that there is a "complete absence of any finding" by the Commission that the rates previously prescribed could be departed from in ordering reduced rates on fine coal over the assailed routes, is without any basis whatever. The contention ignores the Commission's finding (299 I. C. C. at p. 339) that "the evidence leaves no doubt that the assailed rates are too high to move fine coal from and to the points under consideration."

Appellants attack the Commission for having given consideration to the effect of reduced rates on the movement of traffic over the involved routes (Ju. St. pp. 21, 30), but Section 15a(2) expressly provides:

> "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; . . ."

---

[9] *New York Cent. R. Co.* v. *United States*, 99 F. Supp. 394 (D.C., D. Mass., 1951), affd. 342 U. S. 890. In that case the District Court set aside a Commission order cancelling schedules of a rate reduction on export grain which all rail carriers favored on the ground that:

> "We conclude, therefore, that the Commission's decision lacks the support of adequate findings and substantial evidence, and must be set aside . . . (p. 405).

Appellants say (Ju. St. p. 30) that that section "has reference to all traffic from a point of origin to a destination, irrespective of the routes taken." The point appellants seek to make seems to be that as long as traffic moves freely over any route between two points, the Commission is not to consider or be concerned with the effect of rates on the movement of traffic over other routes between the same points. That is a most curious interpretation of the statute and does severe violence to its plain language. It reads completely out of the statute the very significant words, "by the carrier or carriers for which the rates are prescribed."

The higher or unreduced rates over the Clinchfield and Georgia Railroad routes had practically prevented the movement of fine coal between the involved origins and destinations over those routes. To say that the Commission may not consider, particularly in the light of such a statute as Section 15a(2), the effect of the measure of the rates on the movement of traffic in determining what are just and reasonable rates over such routes is to say that the Commission must deal with rates under Section 1(4) on an utterly impractical and unrealistic basis. Such an argument shows clearly what a thoroughly unsubstantial question appellants present.

Plainly what appellants seek in their arguments presented under Question 2 is to have the Court substitute its judgment for that of the Commission in the technical area of reasonableness of rates, which this Court has repeatedly declared it will not do.

CONCLUSION.

The questions presented in appellants' Jurisdictional Statement are entirely devoid of substance. Therefore, appellees' motion should be granted and the decree of the court below affirmed.

Respectfully submitted,

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PROOF OF SERVICE.

I, James W. Hoeland, one of the attorneys for these appellees, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Motion to Affirm and Brief in support thereof on appellants by mailing copies thereof, air-mail postage prepaid, to their attorneys of record, as follows:

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Southern Railway Building,
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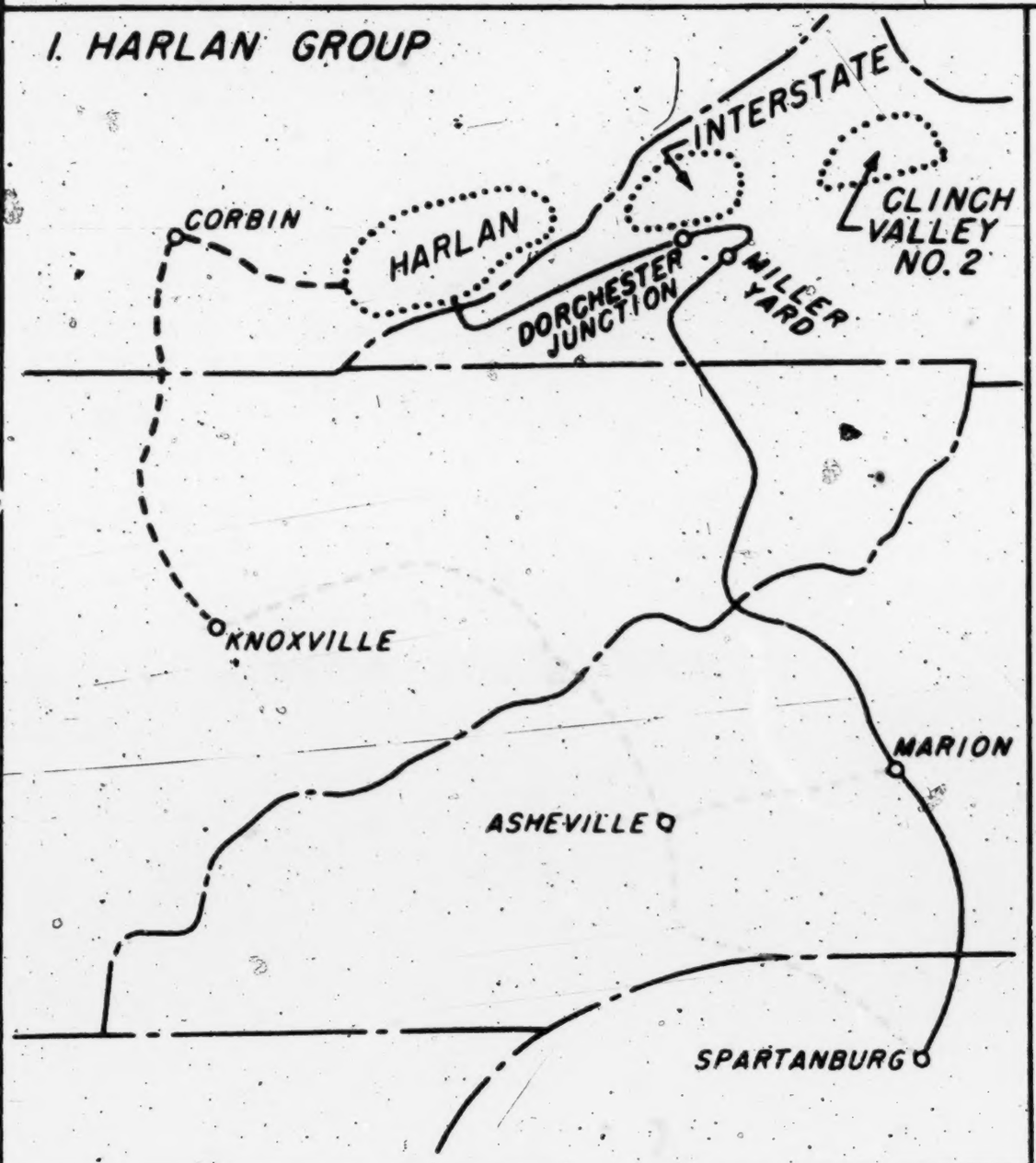
Mr. R. Granville Curry
631 Southern Building,
Washington, D. C.

This 15th day of November, 1957.

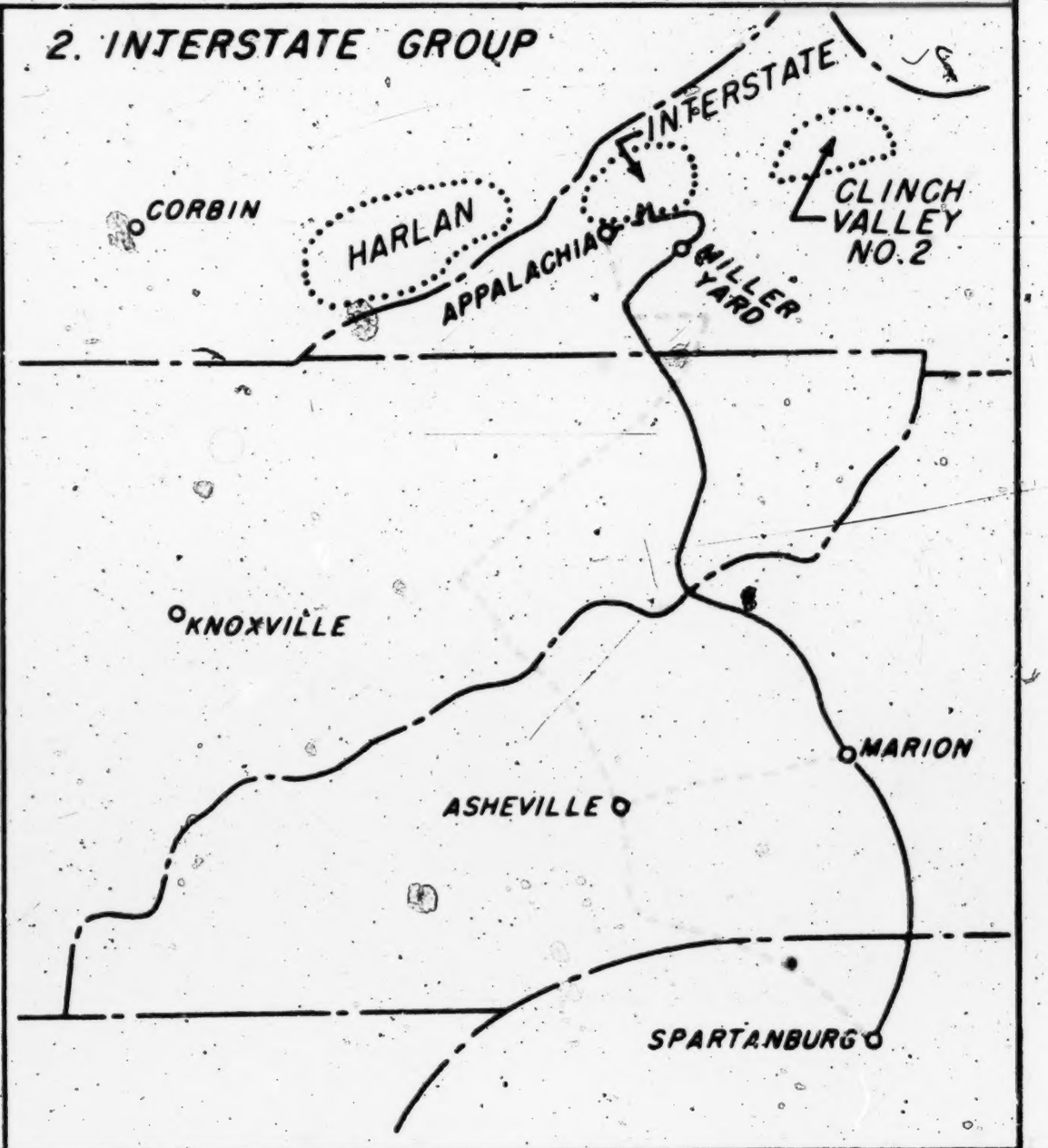
JAMES W. HOELAND.

SCHEMATIC DIAGRAMS OF ROUTES FROM THE SEVERAL MINE GROUPS

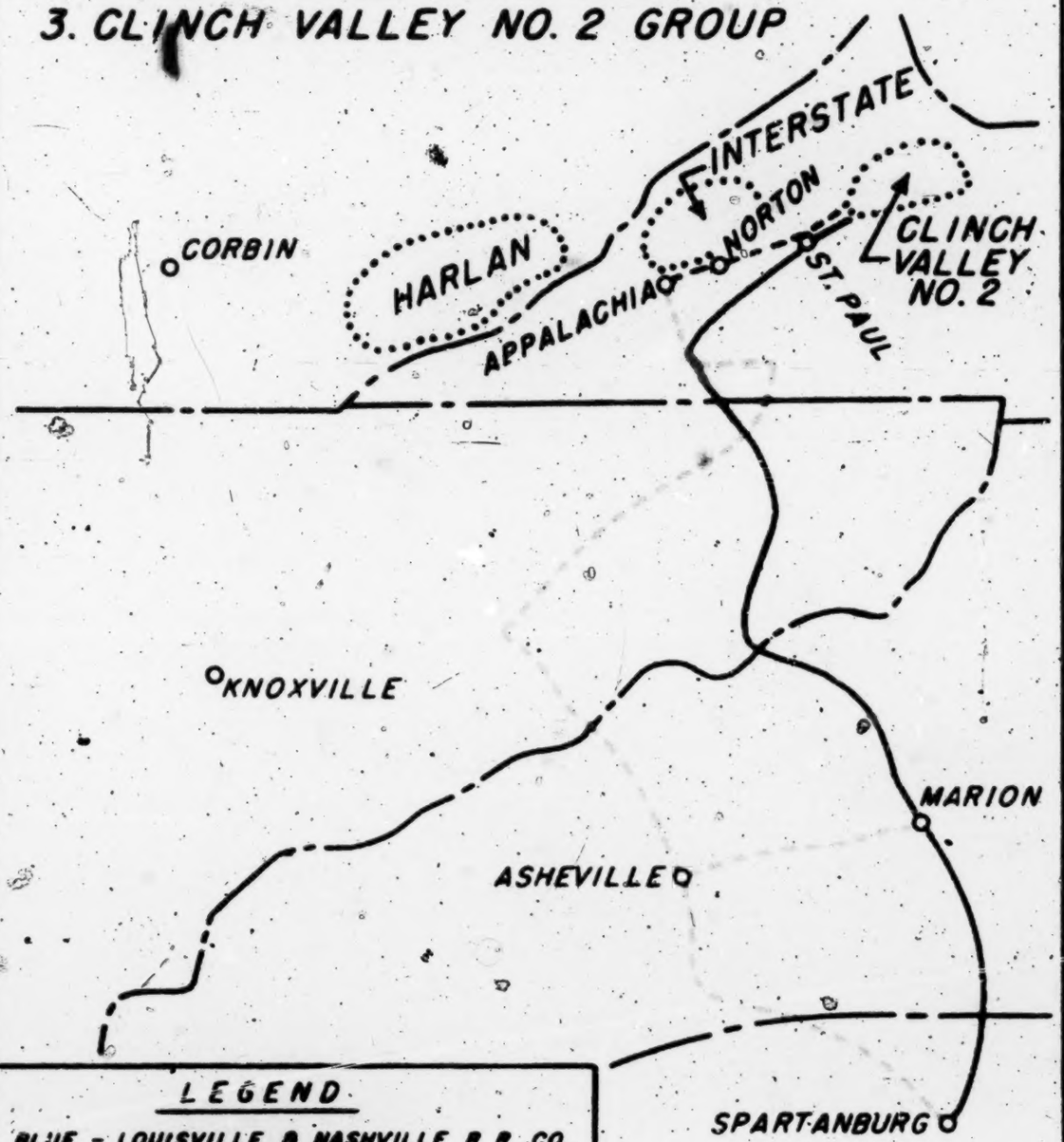
1. HARLAN GROUP



2. INTERSTATE GROUP



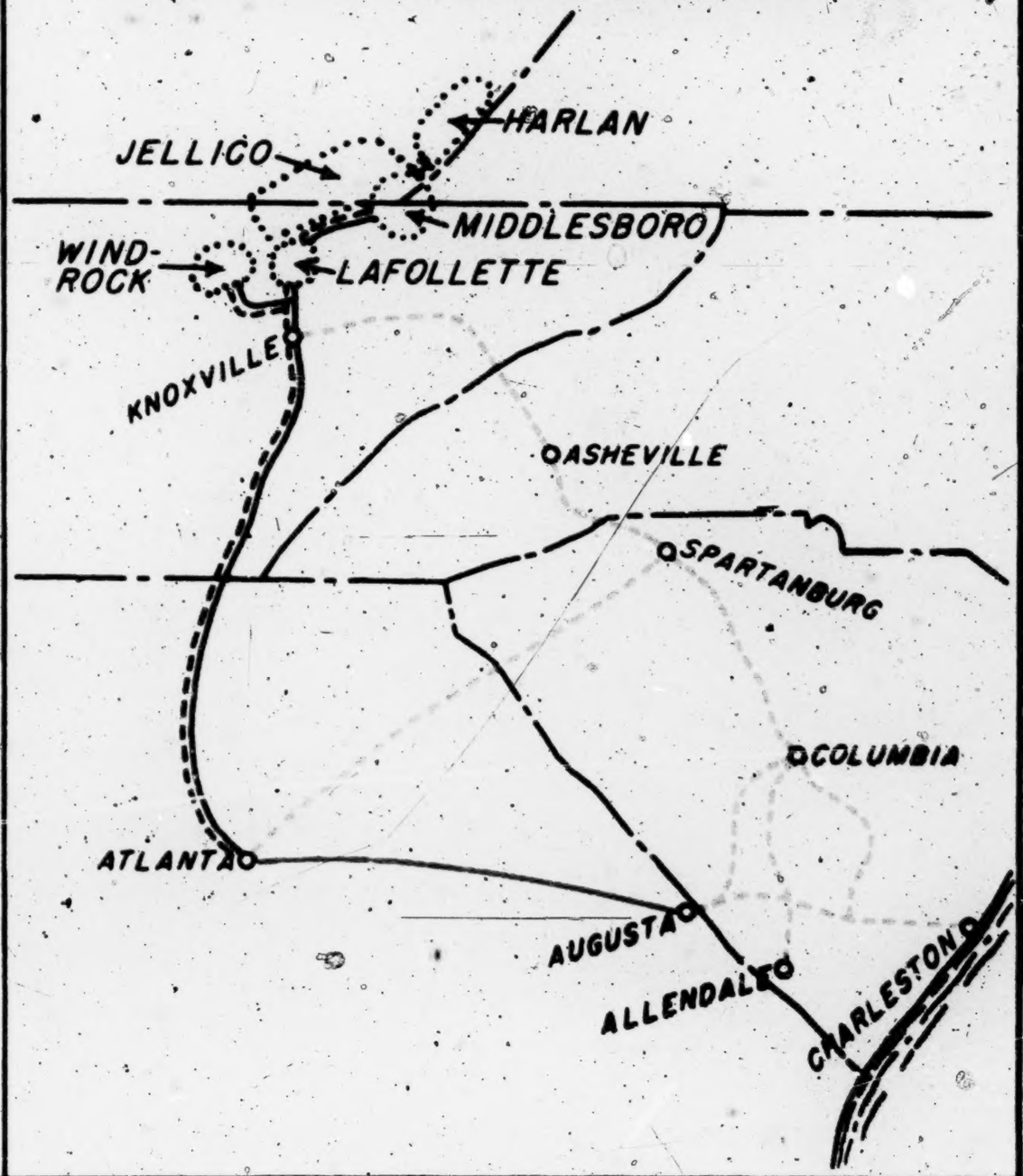
3. CLINCH VALLEY NO. 2 GROUP



LEGEND

BLUE - LOUISVILLE & NASHVILLE R.R. CO.
RED - INTERSTATE R.R. CO.
BROWN - NORFOLK & WESTERN RY. CO.
GREEN - CLINCHFIELD R.R. CO.
ORANGE - GEORGIA R.R.
YELLOW - SOUTHERN RY.

4. HARLAN, JELLICO-MIDDLESBORO, LAFOLLETTE AND WINDROCK GROUPS



Reproduction of Statutory Provisions Pertinent to This Case

TITLE 49 U. S. C.

§ 1. Regulation in general; car service; alteration of line—Carriers subject to regulation

Duty to furnish transportation and establish through routes; division of joint rates

(4) It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

§ 15a. Fair return for carriers

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

LEGEND

BLUE - LOUISVILLE & NASHVILLE R.R. CO.
RED - INTERSTATE R.R. CO.
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No. 558

In the Supreme Court of the United States

OCTOBER TERM, 1957

SOUTHERN RAILWAY COMPANY, CAROLINA AND NORTHWESTERN RAILWAY COMPANY, AND STATE UNIVERSITY RAILROAD COMPANY, APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

MOTION TO AFFIRM

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UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1 (c) of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission, appellees, move that the judgment of the district court be affirmed.

This is a direct appeal from a final judgment dated July 5 and entered July 8, 1956, by a three-judge district court convened under 28 U. S. C. 2284 and 2325, dismissing appellants'[1] complaint seeking to

[1] Appellants are the Southern Railway Company and its connecting lines, the Carolina and Northwestern Railway Company and the State University Railroad Company, together sometimes referred to herein as Southern.

set aside an order of the Interstate Commerce Commission. The jurisdictional statement was served on appellees on October 18, 1957.

QUESTIONS PRESENTED

1. Whether the Commission properly found that the routes in question embracing as an intermediate carrier either the Carolina, Clinchfield and Ohio Railway or the Georgia Railroad are existing through routes.

2. Whether the Commission properly found that the assailed joint rates on fine coal in carloads over the routes in question embracing as an intermediate carrier either the Carolina, Clinchfield and Ohio Railway or the Georgia Railroad are unjust and unreasonable to the extent that they exceed the lower joint rates on fine coal in carloads contemporaneously applicable over other through routes from and to the same points.

STATEMENT

By complaint filed with the Commission on August 29, 1955, the complaining railroads (intervening defendants in the court below) alleged that appellants failed in their duty to join in the maintenance of reasonable through rates on fine coal, in carloads, from mines on the Louisville and Nashville Railroad Company, the Interstate Railroad Company, and the Norfolk and Western Railway Company in eastern Kentucky, eastern Tennessee, and southwestern Virginia, to destinations in North and South Carolina on the lines of appellants over routes embracing as an intermediate carrier either the Carolina, Clinch-

field and Ohio Railway or the Georgia Railroad, in violation of Section 1 (4) of the Interstate Commerce Act (49 U. S. C. 1 (4)). Various shippers intervened in support of the complaint.

On November 15, 1956, after hearing, the Commission issued its report (299 I. C. C. 335), holding that the routes in question embracing the Clinchfield or the Georgia Railroad are existing through routes within the meaning of Section 15 of the Act (49 U. S. C. 15), and that the higher rates on fine coal[2] applicable over those routes are and will be unjust and unreasonable to the extent that they exceed joint carload rates on fine coal contemporaneously available over other through routes, from and to the same points, in which appellants participate as delivering carriers. Accordingly, the Commission ordered appellants to join in joint carload rates on fine coal from the origins to the destinations involved over the routes via the Clinchfield or Georgia Railroad which shall not exceed the lowest joint carload rates on fine coal contemporaneously in effect over any route from and to the same points.

The three-judge district court unanimously sustained the Commission. The court concluded that the routes in question were through routes over which the Commission could compel a reduction in joint rates without reference to the requirements of Section 15

[2] Fine coal is defined as coal which will pass through a bar screen not exceeding 2½ inches between bars, or its equivalent, a 3-inch mesh or 3-inch round perforation, and is commonly described as stoker, slack, steam nut, pea, or nut and slack coal (299 I. C. C. 335; Ex. 4).

(4) of the Act, and that the Commission's action was abundantly justified by the evidence and its findings.

THE FACTUAL SITUATION

The origin mines in this case are the Harlan, Windrock, La Follette, and Jellico-Middlesboro groups in Kentucky and Tennessee on the Louisville and Nashville Railroad, mines in Virginia on the Interstate Railroad, and the Clinch Valley group 2 mines in Virginia on the Norfolk and Western Railway (299 I. C. C. at 336; Exs. 8 and 9). The destinations are points in North and South Carolina served by the Southern Railway and its connecting lines.

Prior to April 8, 1954, the same level of joint carload rates on all sizes of coal, including fine coal, applied over all routes from the origin mines to the North and South Carolina destinations, reflecting the level prescribed by the Commission in 1948 in *Carolina Coal Consumers Conference* v. *A. & R. R. Co.*, 270 I. C. C. 291, from all origin groups from which coal is shipped to North and South Carolina (299 I. C. C. at 336–337; Tr. 94). These routes are set forth in the following table:

I. From mines on the Louisville and Nashville

A. HARLAN FIELD

Route (1)	*Route (2)*
L. & N. to Dorchester Junction, Va.; *Interstate* to Miller Yard, Va.; *Clinchfield* to Marion, N. C., or Spartanburg, S. C.; *Southern* beyond.	*L. & N.* to Knoxville; *Southern* beyond.

B. HARLAN, WINDROCK, LA FOLLETTE, AND JELLICO-MIDDLESBORO FIELDS

Route (1)	*Route (2)*
L. & N. to Atlanta; *Georgia Railroad* to Augusta; *Southern* beyond.	*L. & N.* to Knoxville; *Southern* beyond. *L. & N* to Atlanta; *Southern* beyond.

II. From mines on the Interstate

Route (1)	*Route (2)*
Interstate to Miller Yard, Va.; *Clinchfield* to Marion, N. C., or Spartanburg, S. C.; *Southern* beyond.	*Interstate* to Appalachia, Va.; *Southern* beyond.

III. From mines on the Norfolk and Western (Clinch Valley group 2)

Route (1)	*Route (2)*
N. & W. to St. Paul, Va.; *Clinchfield* to Marion, N. C., or Spartanburg, S. C.; *Southern* beyond.	*N. & W.* to Norton, Va.; *Interstate* to Appalachia, Va.; *Southern* beyond.

In order to meet severe competition from other fuels, notably natural gas and oil, all of the railroads which participate in the movement of coal from mines in eastern Kentucky, eastern Tennessee, Virginia, and West Virginia proposed a voluntary reduction of 35 cents per ton in the rate on fine coal (299 I. C. C. 337–338; Tr. 94–95; Answer to Complaint filed with Commission, par. II). While in accord with the reduction, appellants, through routing restrictions, limited their participation to routes over which they received their longest hauls, and declined to participate in the reduced rates on fine coal moving from mines on the Louisville and Nashville, the Interstate, and the Norfolk and Western over routes which included the Clinchfield or the Georgia Railroad (299 I. C. C. at 338; Tr. 99; Ex. 5; Answer to Complaint filed with Commission, par. II). The urgency of the blanket reduction and the necessity of maintaining rates from mines on the Louisville and Nashville, the Interstate, and the Norfolk and Western in their proper relationship to rates from other origin groups included in the adjustment influenced the complaining carriers to forego requesting the Commission to suspend, under Section 15 (7), the schedules published to effect the

reduction, and they became effective on April 8, 1954 (299 I. C. C. at 338; Tr. 94–95).

The higher joint commodity rates in existence prior to the reduction continued in effect on all sizes of coal, including fine coal, over the routes denied the reduction by appellants' routing restrictions (column (1) in the above table), and on all sizes of coal except fine coal over the routes taking the reduced fine coal rate (column (2) in the above table) (299 I. C. C. at 336–337; Tr. 95–96).

In the *Carolina Coal Consumers* case, 270 I. C. C. 291, 318–319, the Commission had continued rate differentials and relationships previously prescribed for the various coal producing groups, and they were embodied in the joint rates there prescribed. While these differentials were continued in general by the blanket reduction in fine coal rates, since the reductions were 35 cents per ton from the prevailing rates, they were disrupted by appellants' routing restrictions. For example, rates on fine coal from mines in the Big Sandy group on the lines of the Chesapeake and Ohio Railway were on the same basis as the rates from the Harlan group prior to April 8, 1954. *Id.* at 294. Since that date, appellants participate in the reduced fine coal rates from the Big Sandy group over the Chesapeake and Ohio to Elkhorn City, Ky., thence the Clinchfield through Miller Yard to Marion or Spartanburg, and the Southern beyond (299 I. C. C. at 339; Tr. 113; Ex. 13). However, fine coal moving from the Harlan group over the Louisville and Nashville and the Interstate to Miller Yard, the Clinchfield to Marion or Spartanburg, and the South-

ern beyond is subject to the higher joint rates, which are 35 cents per ton higher than those from the Big Sandy group (299 I. C. C. at 339; Tr. 112–113).

It is undisputed that the routes denied the reduced rates were open, active routes over which fine coal, as well as other sizes of coal, had moved for many years (Exs. 20, 34). However, because of the differential of 35 cents per ton prevailing after April 8, 1954, only a few shipments of fine coal moved over the higher rated routes, and they appear to have been the result of shipper error (299 I. C. C. at 337; Tr. 146–147; Ex. 20).

Comparisons of the relative distances embraced by the routes taking the reduced fine coal rate and the routes denied it show that the latter are uniformly shorter with the result that car mile revenues would be higher over them (299 I. C. C. at 338; Exs. 10, 11, 12, 16, 17, 18). For example, with respect to the routes from the mines on the Interstate Railroad, diagrammed at page 11 of the Jurisdictional Statement as representative, the route via the Interstate to Miller Yard, thence the Clinchfield to Spartanburg and the Southern beyond, denied the reduction, is six miles shorter than the routes via the Interstate to Appalachia thence Southern, which takes the reduced rate; and the comparable routes to Marion, North Carolina, thence to North Carolina destinations are 37 miles shorter via the Clinchfield.

ARGUMENT

1. Appellants' principal contention before the Commission (299 I. C. C. at 337), in the court below (J. St. 4a–5a), and here (J. St. 3–6, 10–25), is that

the institution on April 8, 1954, of reduced rates on fine coal, restricted so as not to apply over the routes including the Clinchfield or the Georgia Railroad, closed the routes and extinguished them as through routes. Thus, appellants argue, the Commission must establish the routes as through routes in compliance with Section 15 (4) of the Act (49 U. S. C. 15 (4)) before it may prescribe just and reasonable rates.

Appellants' position is simply that long established, active through routes have been eliminated solely by virtue of the fact that lower rates instituted over competing routes have diverted traffic to the lower rated routes. To support their thesis, appellants point to the "holding out" and "course of business" language in *Thompson* v. *United States,* 343 U. S. 549, and *Denver & Rio Grande W. R. Co.* v. *United States,* 351 U. S. 321, and contend that the situation here fails to meet those tests.

It should be noted at the outset that the mere fact that traffic is prevented from moving over a route because the rates over the route are too high to make it competitive does not, standing by itself, negate its existence as a through route. *Virginian Ry. Co.* v. *United States,* 272 U. S. 658. Compare *Great Northern Ry. Co.* v. *United States,* 81 F. Supp. 921 (D. Del.), affirmed, 336 U. S. 933, holding that a through route existed even though the absence of a transit point for grain had effectively denied its use to shippers.

As this Court has made clear, the question of whether through routes exist is in each case one of

fact. *Denver & Rio Grande W. R. Co. v. United States, supra*, p. 327. It is equally clear that the facts in the *Thompson* and *Denver & Rio Grande* cases are entirely dissimilar from the factual situation which confronted the Commission and the lower court here.

The *Thompson* case involved the question of whether a through route existed from Lenora, Kansas, to Omaha, Nebraska, via the Missouri Pacific from Lenora to Concordia, Kansas, and the Burlington from Concordia to Omaha. In holding that the Commission's determination that the through route existed was without evidentiary support, the Court repeatedly stated that there was no evidence that any transportation service was ever offered, or that any shipment was ever made, from Lenora to Omaha via the Missouri Pacific and the Burlington. 343 U. S. at 551, 557, 560–561. Moreover, joint rates were not in existence between the points involved.

In the *Denver & Rio Grande* case, the Commission found that through routes via the Union Pacific and the Denver & Rio Grande through the Ogden Gateway did not exist. 287 I. C. C. 611, 619. But there joint rates had not existed for years, having been cancelled by published tariffs between 1906 and 1912 (351 U. S. at 328), and the Union Pacific's whole course of conduct had been to guard jealously its long haul and not open the routes via the Rio Grande (*id.* at 330). Nevertheless, the Court merely refused to disturb the Commission's finding, saying (*id.* at 328):

> * * * Whether the evidence could have justified the Commission in finding the existence

in the above-entitled case,[1] move that the judgment below be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

In support of this motion these appellees respectfully present the following:

II.

BRIEF IN SUPPORT OF THE MOTION.

Opening Statement.

This case is an attack by appellants on the report and order of the Interstate Commerce Commission (Division 2) entered November 15, 1956, wherein the Commission made the following ultimate finding:

> "We find that the assailed rates on fine coal, in carloads, from and to the points under consideration herein, over the described through routes embracing the Clinchfield or the Georgia Railroad as intermediate carriers, are and for the future will be unjust and unreasonable to the extent that they exceed or may exceed the joint carload rates on fine coal contemporaneously applicable over other through routes, from and to the same points, in which the defendants participate as delivering carriers. An appropriate order will be entered."[2]

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[1] Intervening defendants below, as of right, under 62 Stat. 970, 63 Stat. 105; 28 U. S. C. § 2323. These appellees received appellants' Jurisdictional Statement on October 19, 1957.

[2] *Carolina, Clinchfield and Ohio Railway, et al.* v. *Southern Railway Company, et al.*, 299 I. C. C. 335, 340 (1956). Appellants' petition for reconsideration of such report and order was denied by order of the entire Commission entered March 18, 1957. By a subsequent order of the Commission the effective date of Division 2's order was stayed until June 6, 1957.

The Court below, by order entered July 5, 1957, dismissed appellants' complaint seeking to set aside the Commission's order.[3]

The lack of substantiality of the questions raised by appellants' Jurisdictional Statement will be clearly seen against the factual background of the development of the case.

In 1948 the Commission, upon complaints filed with it by certain coal shipping interests, prescribed the same level of freight rates on all sizes of coal from all groups of mines[4] in eastern Kentucky, eastern Tennessee, West Virginia and Virginia to North Carolina and South Carolina. The rates so prescribed were based upon a mileage scale. The actual rates to be applied from the base groups to key destinations were set forth in the Commission's report.[5] The Commission also approved in that case the rate differentials obtaining between the various groups of mines, which rate relationships had

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[3] *Southern Railway Company, et al.* v. *United States of America, et al.*, 153 F. Supp. 57 (W.D. N.C., 1957). The same three-judge court had denied theretofore, by order entered May 10, 1957, appellants' motion for a temporary restraining order seeking to stay the effective date of the Commission's order until the Court below rendered its final order in the case.

[4] For freight rate-making purposes, coal mines are generally grouped so as to afford the same rate from all mines within a group even though there may be some variation in distances. Thus this Court explained, in *Ayrshire Corp.* v. *United States*, 335 U. S. 573, 576 (1949):

> "Group rates have been established by the carriers so that all mines within each producing area are accorded the same rates to the same consuming destinations."

[5] *Carolina Coal Consumers Conference* v. *A. & R. R. Co.*, 270 I. C. C. 291 (1948). Please see pp. 318-319 and Appendix I to that report.

existed for some forty years.[6] Such rates, plus subsequently authorized general freight rate increases, were published as joint rates in the freight tariffs and applied on all sizes of coal over existing through routes until April 8, 1954.[7]

On April 8, 1954, all the railroads which participate in the handling of coal from these groups of mines to all destinations in the Carolinas reduced by 35 cents per ton the rates on fine coal[8] for the purpose of meeting, to the extent possible, the severe competition then being encountered by fine coal from other energy-producing fuels such as natural gas and oil.[9] This was a general rate reduction agreed upon by all carriers which participated in the handling of fine coal.[1]

Appellants, however, while in full accord with such rate reductions, declined to participate in the reduced basis from the mines in the Harlan, Windrock, La Follette and Jellico-Middlesboro groups on the Louisville and Nashville Railroad in eastern Kentucky and eastern Tennessee, from the group of mines on the Interstate Railroad in southwestern Virginia, and from the Clinch Valley No. 2 group of mines on the Norfolk and Western Railway in southwestern Virginia, to points in the Carolinas on appellants' rail lines, *over*

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[6] *Ibid.* Please see also *Bituminous Coal Rates to the Southeast*, 37 I. C. C. 652 (1915); *Coal from Virginia, Kentucky and Tennessee to Southeast*, 229 I. C. C. 731 (1938); Tr. 106.

[7] Tr. 94, 104.

[8] Fine coal, by tariff designation, is coal which will pass through a bar screen not exceeding 2½ inches between bars, or its equivalent, a 3-inch perforation. Ex. 4 (Tr. 95, 215).

[9] Tr. 94, 95.

[1] Tr. 94.

routes which included either the Clinchfield Railroad or the Georgia Railroad as an intermediate carrier.[2] These two railroads, the Clinchfield Railroad (commonly referred to, and referred to hereinafter, as the Clinchfield) and the Georgia Railroad, are operated by appellees, Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, as joint lessees of the properties.[3]

Instead, appellants limited their concurrence in the rate reductions to those routes, competitive with the Clinchfield or Georgia Railroad routes, which afforded appellants their long haul on the traffic.[4]

The routes involved are as follows, those in Column A being routes over which the reduction was not made effective and those in Column B being routes over which the reduction was made effective:

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[2]Tr. 97, 98, 99, 118, 240, 241, 242, Ex. 5 (Tr. 96, 215), Ex. 7 (Tr. 97, 215), Ex. 8 (Tr. 98, 215).

[3]Tr. 9, 10, 12, 13.

[4]Tr. 97, 98, 99, 104, 119, 240, 241, 242, Ex. 8 (Tr. 98, 215).

A. Routes Over Which Reduction Was Not Made Effective.	B. Routes Over Which Reduction Was Made Effective.
1. From Harlan Group.	
Louisville and Nashville to Dorchester Junction, Va.; *Interstate* to Miller Yard, Va.; *Clinchfield* to Marion, N. C., or Spartanburg, S. C.; *Southern* beyond.	*Louisville and Nashville* to Knoxville, Tenn.; *Southern* beyond.
2. From Interstate Group.	
Interstate to Miller Yard, Va.; *Clinchfield* to Marion, N. C., or Spartanburg, S. C.; *Southern* beyond.	*Interstate* to Appalachia, Va.; *Southern* beyond.
3. From Clinch Valley No. 2 Group.	
Norfolk & Western to St. Paul; *Clinchfield* to Marion, N. C., or Spartanburg, S. C.; *Southern* beyond.	*Norfolk & Western* to Norton, Va.; *Interstate* to Appalachia, Va.; *Southern* beyond.
4. From Harlan, Jellico-Middlesboro, LaFollette and Windrock Groups.	
Louisville and Nashville to Atlanta, Ga.; *Georgia Railroad* to Augusta, Ga.; *Southern* beyond.	*Louisville and Nashville* to Knoxville, Tenn., or Atlanta, Ga.; *Southern* beyond.

Thus, after April 8, 1954, a lower rate applied on fine coal from a given mine group over the route or routes shown in Column B than over the route shown in Column A, although before that time the same rates, published in the freight tariff as joint rates, applied

on all sizes of coal, including fine coal, over the through tariff routes shown in both Columns A and B.

Schematic diagrams of these routes are set forth in Appendix A.

The schedules effecting the fine coal rate reductions on April 8, 1954, did not cancel the joint rates on all sizes of coal, including fine coal, nor did they cancel the through Clinchfield or Georgia Railroad routes. Those rates and routes remained unchanged. The reduced rates on fine coal simply were made to apply only over appellants' long-haul routes and not over the Clinchfield or Georgia Railroad routes. The result of appellants' limited concurrence was to effect a diversion of fine coal traffic, except for a few shipments made by mistake, to their lines and away from the Clinchfield and the Georgia Railroad routes[5] and to destroy the long-established rate relationships over the involved routes and between the various origin groups.[6]

The Clinchfield and the Georgia Railroad routes are of long standing and have been actively used. During January and February of 1954, to illustrate, 366 cars of coal, including a substantial volume of fine coal, moved over the routes of the Clinchfield from Harlan, Interstate and Clinch Valley No. 2 group mines to points on the Southern Railway in North Carolina and South Carolina.[7] Subsequent to April 8, 1954, a substantial volume of coal, other than fine coal, continued to move over such routes.[7] During four months of 1952 approximately 45 percent of all coal which moved

[5]Ex. 20 (Tr. 122, 215), Tr. 146.
[6]Tr. 106.
[7]Ex. 20 (Tr. 122, 215).

to North Carolina and South Carolina from the Harlan group was routed in connection with the Clinchfield Railroad.[8] Nothing of record remotely suggests that these routes are or have been unused or impracticable for the movement of coal, including fine coal, within the territory here involved.

In all instances the distances via the Clinchfield routes are substantially shorter than the distances via appellants' long-haul routes.[9] Consequently, on equal rates over the several routes the car-mile and ton-mile earnings of the carriers are substantially greater over the Clinchfield routes than over the appellants' long-haul routes.[1]

Those routes via the Georgia Railroad also are shorter than appellants' long-haul routes via Atlanta, thereby producing greater car-mile and ton-mile earnings on equal rates for the carriers over the Georgia Railroad route.[2]

The need for the rate reductions on fine coal to meet competition from other fuels was so urgent and was of such importance to the involved railroads and their shippers alike that these appellees, and others, were foreclosed, as a practical matter, from seeking suspension of the schedules publishing the rate reductions and routing restrictions;[3] consequently, the schedules went into effect.

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[8]This percentage includes coal destined to points not served by appellants. Ex. 34 (Tr. 237, 265).

[9]Ex. 12 (Tr. 112, 215).

[1]Ex. 10 (Tr. 110, 215), Ex. 11 (Tr. 111, 215).

[2]Tr. 121, 122, Ex. 17 (Tr. 119, 215), Ex. 18 (Tr. 121, 215).

[3]Tr. 149, 150.

Thereafter, the aggrieved railroads filed their complaint with the Commission, which resulted in the report and order here under attack, charging in the main that the joint rates then applicable over the assailed routes were then, and for the future would be, unjust and unreasonable to the extent that they exceeded the rates applicable over appellants' long-haul routes in violation of Section 1(4) of the Interstate Commerce Act (54 Stat. 900, 49 U.S.C. §1(4)).[4]

Statutes Involved.

The only statutory provisions pertinent to this case are Section 1(4) of the Interstate Commerce Act,[5] insofar as it relates to the duty of railroads to establish just and reasonable rates, and Section 15a(2) of the same Act.[6] These statutes are reproduced as Appendix B.

Summary of Argument.

The two numbered questions presented by appellants and the several subsidiary questions embraced therein are not substantial.

The findings by the Interstate Commerce Commission that the Clinchfield and the Georgia Railroad routes are existing through routes, and that the rates on fine coal over such routes were unjust and unreason-

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[4]Complaint of these appellees, except Harlan County Coal Operators Association, before the Commission, Paragraph III, p. 4. Shippers, including Harlan County Coal Operators Association, intervened in support of the complainants (299 I. C. C. at p. 336).

[5]54 Stat. 900, 49 U. S. C. § 1(4).

[6]48 Stat. 220, 54 Stat. 912, 49 U. S. C. § 15a(2).

able to the extent that they exceeded the rates contemporaneously applicable on fine coal over appellants' long-haul routes, are determinations of issues of fact which are within the special competence of the Commission.

Such findings are abundantly supported by appropriate preliminary findings and by substantial evidence of record.

The Commission was not required by the pleadings, the evidence or the law to consider the provisions of Paragraphs (3) and (4) of Section 15 of the Interstate Commerce Act,[7] having first properly determined that the Clinchfield and the Georgia Railroad routes are existing through routes.

The Commission has correctly interpreted and applied the provisions of Sections 1(4) and 15a(2) of the Interstate Commerce Act.

Question 1 Presents No Substantial Question.

Appellants' Question 1 is whether the Commission committed fatal error in finding that the Clinchfield and the Georgia Railroad routes were existing through routes.

The existence of a through route is solely a question of fact, to be determined according to the principles enunciated by this Court in *Denver & R. G. W. R. Co.* v. *Union P. R. Co.*, 351 U. S. 321, 327 (1956), as follows:

". . . We said in *Thompson* v. *United States*, *supra*, at 557, that 'In short, the test of the exist-

[7] 54 Stat. 911, 49 U. S. C. § 15(3) and (4).

ence of a "through route" is whether the participating carriers hold themselves out as offering through transportation service.' Findings of through routes can therefore be made on the basis of express agreements between carriers or on the basis of inferences drawn from continuous practices sufficient to show that through routes exist even though not provided for in formal contracts or tariffs. The question in each case is one of fact. Cf. *Through Routes and Through Rates*, 12 I. C. C. 163, 166-167 . . . ."

The question being one of fact, the determination of it by the Commission is conclusive so long as it has a rational basis[8] or is supported by substantial evidence. The doctrine of administrative finality on the issue of the existence of a through route was recognized by this Court in the *Denver and Rio Grande* case, *supra*, at page 328:

". . . Whether the evidence could have justified the Commission in finding the existence of through routes we need not determine. We are satisfied, however, that the evidence before the Commission did not compel it to make such a finding and that its conclusion that the through routes claimed were not in existence is supported by substantial evidence."

Thus, the scope of review of this question should be limited to an examination of the record before the

[8]In *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286-287 (1934), this Court declared:

". . . The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body . . . ."

Commission to determine if the Commission could properly find, as it did,[9] that through routes are in existence via the Clinchfield and the Georgia Railroad. Upon the making of such a finding—and no contrary finding could properly have been made—the provisions of Section 15(3) and (4), which, so far as pertinent to this case, relate solely to the establishment of a through route, do not come into play. Thus, in *Thompson* v. *United States,* 343 U. S. 549, 556 (1952), this Court said:

> "If the Commission had correctly applied the term 'through route' in this case, the Commission's restricted power to 'establish' through routes under Section 15(3) and (4) is not relevant to this case."

In this case the Clinchfield and the Georgia Railroad routes are of long standing and have been actively used in the movement of all types of coal. There is no dispute of that fact.

There is also no dispute that joint rates on coal, including fine coal, were, before and after the reduction of the rates on fine coal, applicable over the Clinchfield and the Georgia Railroad routes.

The carriers at all times held themselves out in their published tariffs to transport fine coal at joint rates over the Clinchfield and the Georgia Railroad routes. Not only were they available through routes but in the case of the Clinchfield routes they were

[9] "It follows that the routes in question are through routes within the meaning of Section 15 of the Act" (299 I. C. C. at p. 337).

the shortest routes, and in the case of the Georgia Railroad routes they were shorter than appellants' routes through Atlanta.

There was simply an obstacle to the free movement of fine coal over such routes because of the higher rates maintained thereover by the action of appellants in seeking to force to their own lines all the traffic they could. As before mentioned, a few shipments of fine coal did move over the Clinchfield route after April 8, 1954. Although such shipments were made by mistake, the error was that of the shipper, who was penalized by having to pay the higher joint rate applying over the Clinchfield route. Nothing in the record remotely suggests that the shipper was billed at any thing other than the higher joint rate or that it was through inadvertence by the railroads that these shipments moved over the Clinchfield route.

Finally, appellants do not question that such routes were open for the movement of all other sizes of coal!

While the existence of a through route it not dependent upon the existence of a joint rate (*Thompson* v. *United States, supra,* 343 U. S. 549, 557), the existence of a joint rate presupposes the existence of a through route, for the words "joint rate" obviously mean the participation of more than one carrier in such a rate, and joint rates, as we have explained, continued in effect over the Clinchfield and the Georgia Railroad routes. It may indeed be said that the existence of a joint rate is conclusive of the existence of a through route. Thus, in *U. S.* v. *Great Northern R. Co.*, 343 U. S. 562, 574 (1951), this Court clearly stated:

". . . joint rates published by two or more carriers are by definition always applicable to a through route over the lines of those carriers . . ."

Consequently, the continued existence of the joint rates applicable over the Clinchfield and the Georgia Railroad routes standing alone establishes a "holding out" by the carriers, including appellants, to perform a through transportation service and is itself sufficient factual support for the Commission's finding. This, when coupled with the long and continuous history of these routes and the role they have always played in the movement of coal of all sizes, makes it too clear to be seriously challenged that the Commission's finding that the Clinchfield and the Georgia Railroad routes were existing through routes was reasonable and right and well supported by the record. In the circumstances no other finding indeed was permissible.

In *Virginian Ry.* v. *United States,* 272 U. S. 658, 666-667 (1926), this Court said, in circumstances quite similar to those present here but where joint rates were not in effect but only combinations of local rates:

"The Virginian contends that the order is void because the Commission directed the establishment of through routes and joint rates without finding that they are necessary in the public interest. Such a finding is essential to the validity of an order under Sec. 15(3). But the order here in question was not sought or made under Sec. 15(3) and does not direct the establishment of through routes and joint rates. Through routes to the West were already in existence. And there were through

rates by combination . . . (citing cases) . . . *The fact that the combination rates were excessive constituted the only obstacle to the movement.* The Chesapeake & Ohio did not oppose the reduction of its rates from the junction to the West. It was willing that these 54 mines on the Virginian should enjoy the rates already open to the other 45. The Virginian resisted a reduction of its local rate to the junction. The Commission found that the combination rate was both unreasonable and discriminatory. It prescribed through rates which it found were reasonable and nondiscriminatory. It did not order joint rates. And no question of divisions was before the Commission. The order was sought and made under Section 1 and Section 3. Section 15(3) does not require that the Commission must make a special finding of public interest, before it can prescribe how an existing through rate found to be unreasonable and discriminatory shall be made conformable to law." (Emphasis added)

Please see also *Great Northern Ry. Co.* v. *United States*, 81 F. Supp. 921 (D.C. D. Del., 1948), affirmed 336 U. S. 933, where it was held that a through route was in existence for the movement of grain although the absence of a transit point had effectively denied use of the route to shippers.

Thompson v. *United States, supra,* 343 U. S. 549, and *Denver & R. G. W. R. Co.* v. *Union Pacific R. Co., supra,* 351 U. S. 321, are relied upon by appellants (Ju. St. pp. 16-21) but are in no respect helpful to them.